

No. 92-8346-CFY
Status: GRANTED

Title: Terry Lee Shannon, Petitioner
v.
United States

Docketed:
April 12, 1993

Court: United States Court of Appeals for
the Fifth Circuit

Counsel for petitioner: Trout, Thomas

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Apr 12 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	May 14 1993		Order extending time to file response to petition until June 18, 1993.
5	Jun 18 1993		Brief of respondent in opposition filed.
6	Jun 24 1993		DISTRIBUTED. September 27, 1993
8	Oct 4 1993		REDISTRIBUTED. October 8, 1993
10	Oct 12 1993		REDISTRIBUTED. October 15, 1993
12	Oct 25 1993		REDISTRIBUTED. October 29, 1993 (Page 24)
14	Nov 1 1993		Petition GRANTED. *****
15	Nov 10 1993	G	Motion of petitioner for appointment of counsel filed.
17	Nov 15 1993	*	Record filed.
		*	Original proceedings U. S. District Court, Northern District of Mississippi (ALSO, SEALED REPORT)
16	Nov 29 1993		Motion for appointment of counsel GRANTED and it is ordered that Thomas R. Trout, Esquire, of New Albany, Mississippi, is appointed to serve as counsel for the petitioner in this case.
18	Dec 2 1993	*	Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
19	Dec 16 1993		Joint appendix filed.
20	Dec 16 1993		Brief of petitioner filed.
21	Dec 16 1993		Brief amicus curiae of Coalition for Fundamental Rights of Ex-Patients (TO BE RP) filed.
22	Jan 20 1994		Brief of respondent United States filed.
23	Feb 2 1994		SET FOR ARGUMENT TUESDAY, MARCH 22, 1994. (1ST CASE).
24	Feb 7 1994		CIRCULATED.
25	Feb 23 1994	X	Brief of petitioner Terry Lee Shannon filed.
26	Mar 18 1994		Letter from counsel for the petitioner received and distributed.
27	Mar 22 1994		ARGUED.

TERRY LEE SHANNON,
PETITIONER

VS.

92-8346

UNITED STATES OF AMERICA,
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

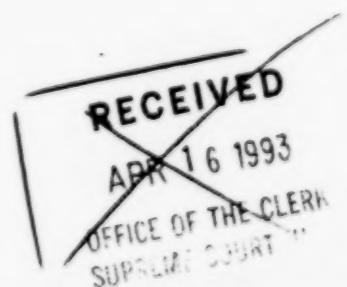
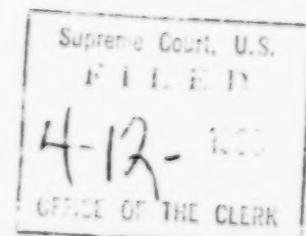
The petitioner, Terry Lee Shannon, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has been represented by counsel appointed under the Criminal Justice Act at the trial of this action in the Northern District of Mississippi and on the appeal of his conviction before the Court of Appeals for the Fifth Circuit. Petitioner has previously been afforded counsel under the Criminal Justice Act at trial and on appeal, and as is permitted by Rule 39.1 in Criminal Justice Act cases, no affidavit is presented in support of this motion.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

TERRY LEE SHANNON - PETITIONER
VS.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Upon the adoption of the Insanity Defense Reform Act of 1984, for the first time in federal jurisprudence Congress provided for a mandatory commitment procedure when a defendant is acquitted because of insanity. The defendant in this case pleaded insanity and requested that the jury be instructed that he would be committed in conformity with the Act should the verdict be Not Guilty Only By Reason of Insanity. The trial court refused the instruction, and the Fifth Circuit affirmed.

Does a proper interpretation of the Insanity Reform Act of 1984 require that the jury be instructed that a Not Guilty Only By Reason of Insanity verdict will not result in the release of a possibly dangerous defendant contrary to the public welfare?

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No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1993

TERRY LEE SHANNON - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Terry Lee Shannon respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit refusing to reverse the judgment of conviction entered by the Northern District Court of Mississippi in the trial of this case following a jury verdict of guilty which it is submitted was erroneously reached due to the refusal of defendant's

requested instruction informing the jury that should their verdict be that the defendant was not guilty only be reason of insanity, he would be committed pursuant to the requirement of the Insanity Defense Reform Act of 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States v. Shannon, 981 F.2d 759 (5th Cir. 1993), and is Exhibit "A" to this petition.

JURISDICTION

The court of appeals opinion in this case was filed on January 12, 1993. No petition for rehearing was filed. This court's jurisdiction is invoked pursuant to Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sole issue presented turns on the Insanity Defense Reform Act of 1984, 18 U.S.C. §§17, 4241 et seq. Under that Act, Congress for the first time enacted a comprehensive substantive and procedural scheme to deal with the presentation and consideration of the insanity defense at trial, and the disposition of those defendants acquitted as a result of that defense.

STATEMENT OF THE CASE

The United States District Court for the Northern District of Mississippi, Eastern Division, had jurisdiction of this case pursuant to Title 18, U.S.C. Section 3231.

The defendant was indicted for having possessed a firearm, being a prior convicted felon. The indictment charged that the defendant had been convicted of at least three prior felonies and under 18 U.S.C. 924(e) was subject to the enhanced punishment of not less than fifteen years imprisonment, without probation or parole.

He was psychologically evaluated prior to trial. Although found to be suffering from a mental illness, he was found capable of understanding the nature of the charge against him and of cooperating with his counsel in his defense.

The case proceeded to trial on the defense of insanity. In its case in chief, the government submitted sufficient evidence, if believed by the jury, to prove beyond a reasonable doubt the following essential elements of the crime charged: (a) that the defendant Terry Lee Shannon did possess on August 25, 1990, within the boundaries of the Northern District of Mississippi a Sterling Arms .22 long rifle pistol, (b) that the pistol had moved in interstate commerce, and (c) that prior to possessing the pistol Terry Lee Shannon had been convicted of a felony crime punishable by a sentence of more than one year in prison. The principal issue for determination by the jury was the defense of insanity.

The Government's proof indicated that Sergeant Marvin Brown of the Tupelo Police Department stopped the defendant while defendant was walking down a street in the early morning hours. Upon being stopped, defendant walked across the street to the police car. After being told he would need to accompany the officer back to the station, the defendant told the officer he did not want to live anymore, whereupon he walked back across the street, reached inside his coat and pulled out a pistol with which he shot himself in the chest.

Two psychologists testified, one an employee of the Federal Bureau of Prisons and one appointed for the defense. Both witnesses agreed that the defendant suffered from a serious mental illness at the time of trial, at the time of the offense, and for some years before. As a result of this testimony, the court instructed the jury on the defense of insanity. The court refused to instruct the jury that if acquitted due to insanity, the defendant would be committed for treatment in accordance with the provisions of Insanity Defense Reform Act. The reason given by the court for refusing the instruction was prior Fifth Circuit authority which pre-dated the Insanity Defense Reform Act of 1984.

The jury returned a verdict of guilty on which judgment was entered, and the Court sentenced the defendant to serve 15 years without the possibility of probation or parole.

The defendant timely perfected his appeal to the Fifth Circuit Court of Appeals, which affirmed the conviction.

WHY THE WRIT SHOULD BE GRANTED

Certiorari should be granted in this case because this case presents an important question of federal law which has not been, but ought to be, settled by this Court. The various positions taken by the circuits which have considered this question are presented below, but at this time no circuit has decided for the position advocated in this petition. However, the decisions of the circuits under the 1984 Act have largely been dictated by stare decisis following precedents which predate the 1984 Act and which were developed when there were no provisions in the law for commitment of defendants acquitted because of insanity. Unless this Court construes the 1984 Act as it affects the issue presented, the change contemplated by Congress as a result of its 1984 reform is stymied because of precedent which predates the 1984 Act. This is an appropriate case for this Court in its supervisory power to make uniform the application of the Insanity Defense Reform Act of 1984 in all circuits.

Although the conflict which has developed among the four circuits construing the issue presented under the 1984 Act may be relatively minor, there is a conflict between those circuits and the D.C. Circuit, which operates under a similar statutory provision which served as the model for the Insanity Reform Act of 1984. Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. den. 381 U.S. 941.

The specific sections of the Act which are relevant to this issue are found at 18 U.S.C. §§ 17, 4242, and 4243. All three sections are

reproduced in their entirety in the Appendix to this Petition. Section 17 defines insanity essentially in terms of the M'Naughten Rule and places the burden to establish the defense on the defendant. Section 4242(b) creates a special verdict of "not guilty only by reason of insanity" in insanity defense cases, in addition to the general verdicts of guilty and not guilty. Section 4243 provides for mandatory commitment for treatment of one found not guilty only by reason of insanity until such time as the court can certify that the defendant no longer poses a danger to others or to property.

Until the adoption of the Act, the defense of insanity in the federal system was strictly a matter of the common law, with the sole exception being the District of Columbia Code. There was no special verdict in the other federal circuits of not guilty by reason of insanity, and there was no provision in any of the Circuits (excluding D.C.) for the commitment of one acquitted when the defense of insanity was successful. If commitment was needed to protect the public safety, the federal system relied on the State involved to pursue the commitment. United States v. McCracken, 488 F.2d 406 (5th Cir. 1974). This state of affairs was remedied by the Insanity Defense Reform Act of 1984.

Lyles and other cases following its rationale note that jurors know by common knowledge the effect of "guilty" and "not guilty" verdicts. Jurors do not know the effect of a verdict of "not guilty by reason of insanity," especially where a special statute requires the commitment of the defendant until he no longer poses a danger to the public. By informing the jury of the effect of that sentence, the court is only

giving the jury the same knowledge regarding the special insanity verdict that it already possesses regarding the two general verdicts. By doing so the court is avoiding the likelihood that because of prejudice toward those impaired by mental illness and fear for the safety of the public if the defendant, possibly dangerous, "goes free" due to their verdict, a jury will convict one otherwise entitled to be acquitted because of insanity.

This reasoning has been very persuasive among the states, who face this same problem in administering their procedures on the insanity defense. There are apparently 22 State jurisdictions which now endorse the giving of such an instruction. Annot., "Instruction In State Criminal Proceeding In Which Defendant Pleads Insanity As To Hospital Confinement In Event Of Acquittal," 81 A.L.R.4th 659 (1990). The opportunity to decide the question apparently does not arise frequently, but when it does there is a definite trend among the states in favor of the position advanced in this petition. e.g., Erdman v. State, 315 Md 46, 553 A.2d 244 (1989); State v. Shickles, 760 P.2d 291 (Utah 1988).

The ABA Standards on Criminal Justice adopt the reasoning of Lyles and its progeny and recommend that an instruction similar to that requested in this case be given. II ABA Standards for Criminal Justice No. 7-6.8 (2d ed. 1986).

This reasoning was also persuasive to the Senate committee considering the Insanity Defense Reform Act of 1984 during its adoption:

The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised may be instructed on the effect of a verdict of not guilty by reason of insanity. If a defendant requests that an instruction not be given, it is within the discretion of the court whether to give it or not. S.Rept.

The reasoning has had little chance to persuade those circuits considering the issue in light of the 1984 Act. The courts have considered that since the requested result was not mandated by the 1984 Act, they are bound by pre-Act precedent not to permit the instruction. United States v. Frank, 956 F.2d 872 (9th Cir. 1991), cert. den. 113 S.Ct. 363 (1992) (In an opinion on the denial of certiorari, Justice Stevens stated that he felt the district court should be required to give the instruction); United States v. Barnett, 968 F.2d 1189 (11th Cir. 1992); United States v. Shannon, 981 F.2d 759 (5th Cir. 1993).

In United States v. Blume, 967 F.2d 45 (2d Cir. 1992) the opinion of the court, per Judge Lumbard, permits the instruction to be given in the discretion of the court. The panel was however split three ways on what the rule ought to be. Judge Newman, concurring in the decision not to reverse, thinks the instruction ought always to be given. 967 F.2d at 50. Judge Winter, concurring in the result, thinks the instruction ordinarily ought not to be given. 967 F.2d at 53.

One other circuit has considered the issue. In United States v. Neavill, 868 F.2d 1000 (8th Cir. 1989), vacated on grant of en banc rehearing 877 F.2d 1394, app. dismissed on motion of the defendant 886 F.2d 220, a panel of the 8th Circuit found that the Insanity Defense Reform Act permitted it to reexamine former precedent in that circuit and adopt the position that the jury should be instructed that the defendant would be committed in the event of an insanity finding. The panel decision was later vacated by operation of law when an en banc

rehearing was granted, and the appeal was later dismissed by the defendant so the 8th Circuit en banc never reconsidered Neavill.

The better reasoned authority and the trend of authority among all but the federal circuits favor the position advocated in this petition. The principal impediment to its adoption in the federal circuits is not any defect in its merit, but rather a rigid application of stare decisis which takes little or no account of the changes brought about by the 1984 Act. With the Barnett, Blume, and Shannon decisions, the status of the issue in the circuits has had further development since the rejection of certiorari in the Frank case, and this issue is now ripe for decision by this Court.

Congress adopted a policy which enables a jury to consider this issue solely on the merits of the psychiatric, psychological, and other proof adduced regarding criminal responsibility, but that policy is being frustrated as a result of circuit precedent adopted long before the Act was adopted. This court is the only recourse this and other defendants have to obtain a rule which permits them to have a jury determine the issue of their criminal responsibility free from fear that a verdict of not guilty solely by reason of insanity may free a dangerous defendant for further depredations on the public.

CONCLUSION

For the reasons stated, the petition for certiorari ought to be granted.

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APPENDICES

Appendix A	United States v. Shannon, 981 F.2d 759 (5th Cir. 1993).
Appendix B	Judgment in a Criminal Case
Appendix C	Relevant parts of the Insanity Defense Reform Act of 1984

UNITED STATES of America,
Plaintiff-Appellee,

v.

Terry Lee SHANNON, Defendant-
Appellant.

No. 92-7294.

United States Court of Appeals,
Fifth Circuit.

Jan. 12, 1993.

Jury convicted defendant of possession of firearm by convicted felon despite defendant's insanity defense following trial in the United States District Court for the Northern District of Mississippi, L.T. Senter, Jr., Chief Judge. Defendant appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that defendant was not entitled to jury instruction about mandatory commitment procedures accompanying verdict of not guilty only by reason of insanity.

Affirmed.

1. Criminal Law 749

Punishment and sentencing are matters entrusted exclusively to trial judge and jury has no concern with consequences of its verdict.

2. Criminal Law 790

Defendant charged with possession of firearm by convicted felon was not entitled to jury instruction stating consequences of jury finding accused not guilty by reason of insanity. 18 U.S.C.A. §§ 4241-4247.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WILLIAMS, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Terry Lee Shannon appeals his conviction for firearm possession. Shannon pleaded insanity at his trial, and the district court instructed the jury on the insanity defense. The court, however, refused to instruct the jury about the mandatory commitment procedures that accompany a jury verdict of "not guilty only by reason of insanity" ("NGI"). Shannon contends that the court's refusal to reveal the required disposition of a defendant acquitted because of his insanity was error in light of the Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241-4247 ("IDRA" or "Act"). We affirm the district court's decision. We agree that district courts possess no discretion to offer such instructions.

I. FACTS AND PRIOR PROCEEDINGS

The principal facts are uncontested and largely stipulated. At about 4:00 a.m. on the morning of August 25, 1990, Sergeant Marvin Brown of the Tupelo Police Department was on roving patrol and stopped Shannon as he walked down a Tupelo street. The officer told Shannon that a detective wanted to speak with him and asked Shannon to accompany him back to the station. Shannon then told Sergeant Brown that he did not want to live anymore, whereupon he walked across the street, pulled a pistol from his coat or shirt, and shot himself in the chest. The wound was not fatal.

Shannon had acquired the gun the day before from his son, with whom Shannon had ridden to the Tupelo Airport where the son was catching a return flight to New York. When Shannon learned his son was planning to board the plane with the pistol, he retrieved it because he knew it was unlawful to go through airport security with a firearm. Shannon also knew as a prior convicted felon that he could not lawfully possess a firearm himself, and he later stated that he had planned to carry the gun to his mother's house until he could deliver it to his parole officer.

In the early morning hours of August 25, Shannon had left his girlfriend's house and began walking to his mother's house, purportedly to leave the gun with her. Before he reached the house, he had been stopped and questioned by Sergeant Brown, and this led to Shannon shooting himself. He was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

Before trial, the defense moved to have Shannon declared mentally incompetent to stand trial.¹ The court scheduled a competency hearing, heard expert testimony regarding Shannon's ability to participate in his trial, and concluded that he was able "to understand the nature and consequences of the proceedings against him and to assist properly in his defense." The case proceeded to trial on the defense of insanity. Shan-

non concedes that the Government presented evidence at trial that, if believed by the jury, was sufficient to prove the essential elements of the crime charged. The jury's role then became the consideration of Shannon's insanity defense.

Shannon concedes he "unquestionably knew as an abstract proposition that it was unlawful for him to possess a firearm." He urges, however, that the question remains whether he appreciated the wrongfulness of his acts under the circumstances prevailing at the time of the offense. Dr. Richard G. Ellis, a psychologist with the Bureau of Prisons, and Dr. Michael D. Roberts, a local clinical psychologist, testified at Shannon's trial regarding his mental condition at that time. The precise nature of their diagnoses differed, but they both agreed that Shannon suffered from mental illness at the time of trial and possibly at the time of the shooting. Despite their acknowledgment of Shannon's chronic mental problems, however, the experts agreed that Shannon's mental illness was not so severe as to render him legally insane at the time of the offense and thus unable to appreciate the nature, quality, and wrongfulness of his actions.

The court properly instructed the jury on the insanity defense.² It refused Shannon's request to inform the jury that an NGI verdict would result in Shannon's involuntary commitment in accordance with § 4243(e) of

1. 18 U.S.C. § 4241, Determination of mental competency to stand trial, establishes the procedure for evaluating whether a defendant is "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."

2. The district court defined "insanity" as follows: "The defendant was insane as the law defines that term only if, as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense." This definition comports

the IDRA.³ The jury rejected Shannon's insanity defense and returned a guilty verdict. Because Shannon already had three previous convictions, the district court sentenced him to serve fifteen years without the possibility of probation or parole pursuant to 18 U.S.C. § 924(e)(1). Shannon's appeal is timely.

II. DISCUSSION

This case presents a single issue: did the district court err in refusing to instruct the jury that Shannon would be committed until he was no longer dangerous if the jury found him "not guilty only by reason of insanity"? The issue arises because it is urged that the established law was changed by the IDRA of 1984.

A. The Law Before the 1984 Act

[1] The well-established general principle is that a jury has no concern with the consequences of its verdict. As the Supreme Court stated succinctly in *Rogers v. United States*, "the jury [has] no sentencing function and should reach its verdict without regard to what sentence might be imposed." 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975). This Circuit has long recognized that punishment and sentencing are matters entrusted exclusively to the trial judge. We

with the statutory provisions of 18 U.S.C. § 17.

3. Section 4243(e) ensures that a federal criminal defendant found not guilty by reason of insanity will not be released onto the streets. It provides that "the Attorney General shall hospitalize the person for treatment in a suitable facility" until a State assumes responsibility for the defendant's care and treatment or until it can be certified that his release will not pose a substantial danger to others or to property.

Shannon's counsel attempted to make this mandatory confinement known to the jurors.

have held specifically that juries should not ordinarily be informed about the consequences of an NGI verdict. See *United States v. McCracken*, 488 F.2d 406, 423 (5th Cir.1974) ("Except where a special provision mandates a jury role in assessment or determination of penalty, the punishment provided by law for offenses charged is a matter exclusively for the court and should not be considered by the jury in arriving at a verdict as to guilt or innocence.").

[2] *McCracken*, a pre-IDRA case, posed an issue similar to the one we face today. We reversed the defendant's murder conviction because the trial court instructed the jury that if it returned an NGI verdict, the defendant would be freed. The jury charge embodied a then-accurate statement of the law: no federal statutory scheme yet provided for the disposition of defendants acquitted due to insanity. We recognized, however, that the court's instruction possibly served to coerce or induce a guilty verdict since jurors at that time were assumed to be fearful of those with mental illness and might convict insane defendants based upon a perceived need to protect society rather than face the risks resulting from their immediate release onto the streets. We lamented that the absence of federal commitment procedures led to heavy reliance upon state authorities to institute commitment proceedings against

During a jury instruction conference, counsel suggested two alternative instructions: (1) "In the event it is your verdict that the defendant is not guilty only by reason of insanity, it is required that the Court commit the defendant," or (2) "[Y]ou should know that it is required that the Court commit defendant to a suitable hospital facility until such time as the defendant does not pose a substantial risk of bodily injury to another or serious danger to the property of another." The trial judge rejected both versions.

those acquitted by reason of insanity. We labelled such dependence one of the "the harsh effects of the federal statutory silence."

In the *McCracken* opinion, we noted the District of Columbia Circuit's decision in *Lyles v. United States*, 254 F.2d 725, 728 (D.C.Cir.1957) (en banc), cert. denied, 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067 (1958). In *Lyles*, a divided court held that a jury should be informed that such an NGI verdict would result in defendant's involuntary commitment. But a key feature distinguished *Lyles*. The case arose under the D.C. Code, which Congress had amended to provide for mandatory commitment of a defendant who asserted a successful insanity defense.⁴ Despite our apparent appreciation for such a statute, we noted that the absence of comparable federal legislation made the D.C. Circuit's approach inapposite for other circuits. *McCracken*, 488 F.2d at 422. We therefore concluded in *McCracken* that, absent an explicit statutory directive mandating an enhanced jury role, it was inappropriate for jurors to consider possible post-trial punishments. *Id.* at 423.

McCracken was a natural descendant of our earlier decision in *Pope v. United States*, 298 F.2d 507 (5th Cir.1962), cert. denied, 381 U.S. 941, 85 S.Ct. 1776, 14 L.Ed.2d 704 (1965). In *Pope*, we affirmed the trial court's refusal to inform the jury about what would occur if they found *Pope* "not guilty only by reason of insanity." There too, we expressly rejected the *Lyles* approach, holding that "[d]ifferent rules and different statutes apply to the Courts of the District of Columbia." *Id.* at 509. Emphasizing our long-standing

4. The Code provision did not by its own terms mandate the giving of such an instruction. See *Lyles*, 254 F.2d at 728-29.

5. Shannon has not shown that in deliberating, the jury in this case actually entertained these

focus on the unique duties of judges and juries, we said:

Unless otherwise provided by statute, it is the duty of the court to impose sentence, or make such other disposition of the case as required by law, after the facts have been decided by the jury. To inform the jury that the court may impose minimum or maximum sentence, will or will not grant probation, when a defendant will be eligible for a parole, or other matters relating to disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided. In a case of this nature what they were to decide was whether the defendant was guilty or not.

Id. at 508 (emphasis added).

B. The IDRA's Impact

Shannon argues strongly that the trial court's ruling left the jury with no guidance as to the actual implications of its verdict. As a result, the confused jury fell captive to the misconception that only two real options existed—guilty (go to jail) or not guilty/NGI (go free). Because they feared that a dangerous, mentally-ill person would be released if they returned an NGI verdict, they were induced to reject his insanity defense, however meritorious it may have been.⁵ Appealing to the *McCracken* court's concern that uninformed and frightened juries might convict while still questioning a defendant's sanity, Shannon urges us to apply "common sense

misconceptions, failed to follow the judge's instructions, or considered extraneous factors that colored its verdict.

and justice".⁶

Shannon asserts that Congress's passage of the IDRA constitutes a statutory change that mandates, or at least authorizes, the instruction he seeks. Because the justification for a different rule in different parts of the federal system has now been removed, Shannon argues, the practice announced in *Lyles* must now be applied nationwide. We must disagree that the IDRA alters the calculus. The statute enacted a comprehensive scheme for dealing with insanity in federal criminal cases. Yet it has no provision expanding the jury's role. It has no wording that even touches upon this role. It leaves the jury solely with its customary determination of guilt or innocence.

For support, Shannon cites the Eighth Circuit's opinion in *United States v. Neavill*, 868 F.2d 1000 (8th Cir.), vacated, *reh'g en banc granted*, 877 F.2d 1394 (8th Cir.), *appeal dismissed*, 886 F.2d 220 (8th Cir.1989). In *Neavill*, the panel found that the IDRA permitted it to re-examine former precedent, in which the court had joined this Circuit and others in rejecting the *Lyles* rationale. In reaching its decision, the court relied heavily on a Senate Committee report that endorsed the D.C. Circuit's rationale:

The [Senate] Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not

6. The instruction Shannon desires could actually work to his disadvantage and cause him more harm than good. As the Third Circuit perceptively noted in *Government of V.I. v. Fredericks*: "A juror who is convinced that a defendant is dangerous, but who believes [the defendant] did not . . . commit the [offense] charged, might be willing to compromise on a verdict of not guilty by reason of insanity rather than insist on an acquittal." 578 F.2d 927, 936 (3d Cir.1978). Moreover, a jury

guilty by reason of insanity. If a defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.

S.Rep. No. 98-225, 98th Cong., 1st Sess. 240, reprinted in 1984 U.S.Code Cong. & Admin.News 3182, 3422 (footnotes omitted). *Neavill*, however, has no current precedential value. As the citation makes clear, it was vacated by operation of law when rehearing *en banc* was granted and then was dismissed at Neavill's request prior to reconsideration by the full Circuit.

Shannon likewise emphasizes the Act's legislative history and insists that it illustrates Congress's intentions. We agree, however, with the Ninth Circuit's refusal to disregard the statute's clarity by embracing the committee report:

This statement does not have the force of law nor does it purport to interpret or explain ambiguous language in the statute regarding instructions. See *International Brotherhood of Electrical Workers Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C.Cir.1987) ("While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an independent source having the force of law.... [C]ourts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point." (emphasis in original) (citations omitted)).

could assume that due to overcrowded mental hospitals, strapped social services budgets, sympathetic judges, etc., a defendant will be released after only a short period of commitment. To combat the prospect of early release, the jury could simply opt to find him guilty. The mandatory instruction Shannon seeks, therefore, seems to be fraught with the same prejudice and jury confusion he wants to avoid.

United States v. Frank, 956 F.2d 872, 881 (9th Cir.1991), cert. denied, — U.S. —, 113 S.Ct. 363, 121 L.Ed.2d 276 (1992).⁷

In *McCracken*, 488 F.2d at 423, we said that a specific statutory provision was required to justify an enhanced jury role. We do not have it here. The IDRA does not expressly provide that a jury be instructed regarding mandatory commitment procedures. In contrast, Congress explicitly dealt with what juries should be told by way of instruction when a psychiatric defense is raised. 18 U.S.C. § 4242(b) provides:

If the issue of insanity is raised . . . the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of insanity.

(emphasis added)

It is noteworthy that Congress was explicit in directing what issues should be raised, yet said nothing about informing juries of the consequences of any of the three choices. Courts may not properly attempt to discern what Congress, while remaining quiet, assumed would happen. Absent an affirmative statutory requirement that juries be granted a sentencing role, we adhere to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict.

Finally, the other peripheral sources that Shannon cites for support are likewise devoid of statutory anchors and do not compel a different result. Specifically, Shannon notes that the ABA Standards address the issue and recommend that the proposed instruc-

7. Justice Stevens wrote an opinion "respecting the denial" of the writ of certiorari in *Frank*. He stated that the rule should be that

tion be given. II ABA Standards for Criminal Justice No. 7-6.8 (2d ed. 1986). Moreover, he insists that the prevailing trend among the states favors requiring or authorizing the instruction. Thomas M. Fleming, Annotation, *Instructions in State Criminal Case in which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 A.L.R. 4th 659, 667 (1990). These sources are no authority to abandon our long-standing precedents without congressional mandate. Our decision today is grounded upon the traditional roles of judges and juries and rooted in the Act's plain language.

Three other circuits have examined the issue. None has taken the passage of the Act to mandate such an instruction. *Frank*, 956 F.2d at 881; *United States v. Blume*, 967 F.2d 45, 49 (2d Cir.1992); *United States v. Barnett*, 968 F.2d 1189, 1192 (11th Cir.1992). Two of the Circuits permit judges to provide such information, one in narrow and possibly justifiable circumstances and the other more broadly.

In *Frank*, a divided panel of the Ninth Circuit affirmed the district court's refusal to instruct the jury on the effect of an NGI verdict, holding that the IDRA fails to enlarge the jury's role beyond the traditional guilt/innocence determination. But the Court qualified its holding, concluding that "prosecutorial misconduct" which suggests that those persons found innocent by reason of insanity are released into society properly may warrant a curative instruction to correct the error and abate jury anxiety or confusion. 956 F.2d at 881. In *Barnett*, the Eleventh Circuit followed the holdings of *Rogers* and *McCracken*: "Punishment, or the lack

the district court must give the disputed instruction to the jury.

thereof, is a matter entrusted to the trial judge." 968 F.2d at 1192. The opinion does not expressly discuss whether instructional discretion exists in certain cases, but seems to intimate that it does not. A recent panel of the Second Circuit was also divided on the issue. *Blume*, 967 F.2d at 50. Judge Lumbard, writing for the Court, stated that the Senate Committee report's language leaves the instructional decision to the district court's discretion; Judge Newman, writing separately, urges that the instruction should always be given unless the defendant requests its omission, but he adjusted his position to join Judge Lumbard and give the Court a majority position in favor of the discretionary approach. Judge Winter, also concurring separately in the result but disagreeing with the NGI analysis, seems to adopt a variety of the *Frank* rationale, urging that the instruction typically should not

be given. Less the jury has evinced a belief that those acquitted NGI usually go free. We adhere to our established precedents since there is no statutory directive that opens up to juries a role in the assessment or determination of penalties. We properly are concerned about possible unfortunate consequences of any alteration of the traditional role of the jury. We are convinced that a carefully limited and precise statutory mandate must be required. There is none here.

III. CONCLUSION

We find the established law unchanged by the 1984 Insanity Defense Reform Act. The district court acted properly in refusing an instruction stating the consequences of finding the accused not guilty only by reason of insanity.

AFFIRMED.

FILED

United States District Court

District of MISSISSIPPI by NORMAN L. GILLESPIE, CLERK
V. Adams

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: CRE90-170THOMAS TROUT

Defendant's Attorney

(Name of Defendant)

THE DEFENDANT:

pleaded guilty to count(s) _____
 was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18/922(g)(1) and 924(e)(1)	POSSESSION OF A FIREARM BY A PERSON WITH THREE (3) PRIOR CONVICTIONS PUNISHABLE BY TERM OF IMPRISONMENT EXCEEDING ONE (1) YEAR	08/25/90	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

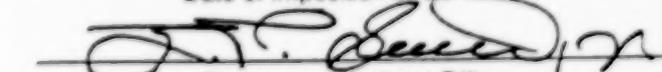
The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
 Count(s) _____ (is)(are) dismissed on the motion of the United States.
 It is ordered that the defendant shall pay a special assessment of \$ 50, for count(s) 1, which shall be due immediately as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 587-42-1839Defendant's Date of Birth: 03/04/54

APRIL 16, 1992

Date of Imposition of Sentence



Signature of Judicial Officer

L.T. SENTER, JR., CHIEF U.S. DISTRICT JUDGE

Name & Title of Judicial Officer



Date

Entered 4/22/92

Defendant's Mailing Address:

526 NORTH GREENTUPELO, MS 38801

Defendant's Residence Address:

526 NORTH GREENTUPELO, MS 38801

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Defendant: TERRY LEE SHANNON
Case Number: CRE90-170Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTEEN (15) YEARS.

The court makes the following recommendations to the Bureau of Prisons:

THE COURT RECOMMENDS THAT THE DEFENDANT BE INCARCERATED IN A FACILITY WHERE HE CAN RECEIVE MENTAL HEALTH TREATMENT AND THERAPY.

The defendant is remanded to the custody of the United States marshal.
 The defendant shall surrender to the United States marshal for this district,

at _____ a.m.
 at _____ p.m. on _____

as notified by the United States marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
 before 2 p.m. on _____
 as notified by the United States marshal.
 as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

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United States Marshal

By _____

Deputy Marshal

Defendant: TERRY LEE SHANNON
Case Number: CRE90-170Judgment—Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____
FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- The defendant shall not possess a firearm or destructive device.

THE DEFENDANT SHALL PARTICIPATE IN A PROGRAM FOR THE TREATMENT OF SUBSTANCE ABUSE, TO INCLUDE TESTING TO DETERMINE WHETHER OR NOT THE DEFENDANT HAS REVERTED TO THE USE OF DRUGS OR ALCOHOL, UNDER THE DIRECTION OF THE PROBATION OFFICER.

THE DEFENDANT SHALL PARTICIPATE IN A MENTAL HEALTH PROGRAM APPROVED BY THE PROBATION OFFICER.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition,

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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Defendant: TERRY L. SHANNON
Case Number: CRE90-170Judgment—Page 4 of 4

STATEMENT OF REASONS

 The court adopts the factual findings and guideline application in the presentence report.

OR

 The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 10Criminal History Category: VIImprisonment Range: 15 ~~XXXXXXXXXX~~ MONTHS YEARSSupervised Release Range: 3 to 5 yearsFine Range: \$ 2,000 to \$ 20,000 Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ _____

 Full restitution is not ordered for the following reason(s): The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

 The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

 upon motion of the government, as a result of defendant's substantial assistance. for the following reason(s):

/32

§ 17. Insanity defense

(a) **Affirmative defense.**—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) **Burden of proof.**—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(Added Pub.L. 98-473, Title II, § 402(a), Oct. 12, 1984, 98 Stat. 2057, § 20, redesignated Pub.L. 99-646, § 34(a), Nov. 10, 1986, 100 Stat. 3599.)

the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) **Discharge.**—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) **Admissibility of finding of competency.**—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a

defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2057.)

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 876 (May 13, 1930, ch. 254, § 6, 46 Stat. 271).

Changes were made in phraseology and surplusage omitted.

§ 4242. Determination of the existence of insanity at the time of the offense

(a) **Motion for pretrial psychiatric or psychological examination.**—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) **Special verdict.**—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2059.)

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 877 (May 13, 1930, ch. 254, § 7, 46 Stat. 272).

Minor change was made in phraseology.

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) **Determination of present mental condition of acquitted person.**—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of

the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) **Hearing.**—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) **Burden of proof.**—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) **Determination and disposition.**—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another; whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(f) **Discharge.**—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (e) determines that the person has recovered from his mental disease or defect to such

an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(g) **Revocation of conditional discharge.**—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (f) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and,

upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(h) Limitations on furloughs.—An individual who is hospitalized under subsection (e) of this section after being found not guilty only by reason of insanity of an offense for which subsection (d) of this section creates a burden of proof of clear and convincing evidence, may leave temporarily the premises of the facility in which that individual is hospitalized only—

(1) with the approval of the committing court, upon notice to the attorney for the Government and such individual, and after opportunity for a hearing;

(2) in an emergency; or

(3) when accompanied by a Federal law enforcement officer (as defined in section 115 of this title).

(As amended Pub.L. 98-473, Title II, § 403(a), Oct. 12, 1984, 98 Stat. 2059; Pub.L. 100-690, Title VII, § 7043, Nov. 18, 1988, 102 Stat. 4400.)

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 878 (May 13, 1930, ch. 254, § 8, 46 Stat. 272).

Changes were made in translations and phraseology, and unnecessary words omitted.

§ 4244. Hospitalization of a convicted person suffering from mental disease or defect

(a) **Motion to determine present mental condition of convicted defendant.**—A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a men-

tal disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

(c) **Hearing.**—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) **Determination and disposition.**—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

(e) **Discharge.**—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, as amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2061.)

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JB
ORIGINAL

No. 92-8346

Supreme Court, U.S.
FILED
JUN 18 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TERRY LEE SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
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Washington, D.C. 20530
(202) 514-2217

12 PM

QUESTION PRESENTED

Whether the district court was required to give petitioner's requested jury instruction on the effect of a verdict of not guilty by reason of insanity.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2041-A2047) is reported at 981 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. The petition for a writ of certiorari was filed on April 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18

U.S.C. 922(g)(1). He was sentenced to 15 years' imprisonment, to be followed by a three-year period of supervised release. The court of appeals affirmed. Pet. App. A2041-A2047.

1. At about four o'clock in the morning on August 25, 1990, a Tupelo, Mississippi, police officer stopped petitioner as he walked down a street. The officer told petitioner that a detective wanted to speak with him and asked petitioner to accompany him to the police station. Petitioner stated that he did not want to live anymore, walked across the street, pulled a pistol from his coat or shirt, and shot himself in the chest. The wound was not fatal.

Pet. App. A2041.

Petitioner, a convicted felon, was charged with unlawful possession of a firearm. At trial, petitioner raised an insanity defense. Petitioner asked the district court to give one of the following two instructions to the jury:

(1) "In the event it is your verdict that [petitioner] is not guilty only by reason of insanity, it is required that the Court commit [petitioner]," or

(2) "[Y]ou should know that it is required that the Court commit [petitioner] to a suitable hospital facility until such time as [petitioner] does not pose a substantial risk of bodily injury to another or serious danger to the property of another."

Pet. App. 2043 n.3. Although the district court instructed the jury on the insanity defense, the court declined to give either of the proposed instructions on the effect of a verdict of not guilty by reason of insanity. Ibid.

2. The court of appeals affirmed. Pet. App. A2043-A2047. The court noted "[t]he well-established general principle * * *

that a jury has no concern with the consequences of its verdict." Pet. App. A2043, citing Rogers v. United States, 422 U.S. 35, 40 (1975). Relying on prior circuit precedent, the court held that the district court properly refused to instruct the jury on the effect of a verdict of not guilty by reason of insanity. Such instructions, the court explained, "tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided." Pet. App. A2044, quoting Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962).

The court held that the Insanity Defense Reform Act of 1984 did not address the subject of jury instructions and therefore did not require a different result. Pet. App. A2044-A2047. Reiterating its concerns about the "possible unfortunate consequences of any alteration of the traditional role of the jury," Pet. App. A2047, the court concluded: "Absent an affirmative statutory requirement that juries be granted a sentencing role, we adhere to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict," Pet. App. A2046.

ARGUMENT

Petitioner contends (Pet. 5-9) that the district court erred by refusing to give an instruction on the effect of a verdict of not guilty by reason of insanity. The Court recently denied a petition for a writ of certiorari raising that issue. See Frank v.

United States, 113 S. Ct. 363 (1992). There is no reason to reach a different result here.

The courts of appeals, with the exception of the District of Columbia Circuit, have held that a district court is not required to instruct the jury as to the effect of a verdict of not guilty by reason of insanity. See, e.g., United States v. Blume, 967 F.2d 45 (2d Cir. 1992); United States v. Frank, 956 F.2d 872, 878-882 (9th Cir. 1991), cert. denied, 113 S. Ct. 363 (1992); United States v. Portis, 542 F.2d 414, 420-421 (7th Cir. 1976); United States v. Alvarez, 519 F.2d 1036, 1047-1048 (3d Cir. 1975); United States v. McCracken, 488 F.2d 406, 422 (5th Cir. 1974); United States v. Borum, 464 F.2d 896, 900-901 (10th Cir. 1972); Evalt v. United States, 359 F.2d 534, 544-547 (9th Cir. 1966). Those decisions rest on the principle that a jury should base its verdict solely on the evidence, and not on considerations of punishment or the consequences of the verdict. See United States v. Rogers, 422 U.S. at 40 (jury should have been admonished to reach its verdict without regard to the sentence to be imposed). As the court of appeals noted (Pet. App. A2044), instructions about such matters may distract the jury from its proper role as the finder of fact, confuse the issues, and increase the likelihood of compromise verdicts. See United States v. Frank, 956 F.2d at 879; United States v. Reed, 726 F.2d 570, 579 (9th Cir.), cert. denied, 469 U.S. 871 (1984).

In Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957) (en banc), cert. denied, 356 U.S. 961 (1958), the District of Columbia

Circuit, construing a statute applicable only in the District of Columbia, held that the trial court was required to instruct the jury that a verdict of not guilty by reason of insanity would result in the hospitalization of the defendant. The District of Columbia statute expressly authorized a verdict of not guilty by reason of insanity and provided for the commitment of defendants acquitted by reason of insanity. The court concluded that the jury was entitled to know the effect of the insanity verdict, just as it knew from common knowledge the effect of a verdict of guilty or not guilty. 254 F.2d at 728.

When Lyles was decided, federal law did not specifically provide for a verdict of not guilty by reason of insanity, or for the commitment of defendants who were acquitted by reason of insanity. See Evalt v. United States, 359 F.2d at 544-545. In 1984, however, Congress enacted the Insanity Defense Reform Act, Pub. L. No. 98-473, Title II, Section 403(a), 98 Stat. 2057 (codified at 18 U.S.C. 17, 4241-4247). That Act expressly provides for a verdict of not guilty by reason of insanity and for the commitment of defendants who are found not guilty by reason of insanity. See 18 U.S.C. 4242-4243.

The Act does not require district courts to instruct juries on the effect of a verdict of not guilty by reason of insanity. As the court of appeals noted (Pet. App. A2045-A2046), the Act simply does not address that question. It is true that a Senate Report stated that

[t]he Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which

the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If a defendant requests that an instruction not be given, it is within the discretion of the court whether to give it or not.

S. Rep. No. 225, 98th Cong., 1st Sess. 240 (1983) (footnotes omitted). Of course, statements in committee reports are not legislation. Indeed, the Committee's reference to the procedure used in the District of Columbia indicates that Congress (or at least the Committee) was aware of the Lyles decision, but chose not to incorporate that decision into the statute. In any event, the Senate Report did not suggest that the district court is required to give an instruction on the effect of a verdict of not guilty by reason of insanity, but only that the Committee endorsed a procedure under which the district court "may" give such an instruction.

Petitioner asserts (Pet. 6-7) that such an instruction is necessary because jurors are likely to speculate about the consequences of a verdict of not guilty by reason of insanity. But district courts routinely instruct juries that they are not to concern themselves with the consequences of the verdict, and the "almost invariable presumption of the law" is "that jurors follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206 (1987) (citing Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985)). Moreover, as the court of appeals noted, an instruction concerning the effects of a verdict of not guilty by reason of insanity might work to the disadvantage of some defendants. "A juror who is convinced that a defendant is dangerous, but believes [the

defendant] did not * * * commit the [offense] charged, might be willing to compromise on a verdict of not guilty by reason of insanity rather than insist on an acquittal." Pet. App. A2045, quoting Government of the Virgin Islands v. Fredericks, 578 F.2d 927, 936 (3d Cir. 1978). And, as the court of appeals observed (ibid.):

[A] jury could assume that due to overcrowded mental hospitals, strapped social services budgets, sympathetic judges, etc., a defendant will be released after only a short period of commitment. To combat the prospect of early release, the jury could simply opt to find him guilty. The mandatory instruction [petitioner] seeks, therefore, seems to be fraught with the same prejudice and jury confusion he wants to avoid.

The courts of appeals should be permitted to consider these issues in light of the Insanity Defense Reform Act. As Justice Stevens noted in an opinion respecting the denial of the petition for a writ of certiorari in Frank v. United States, "a square conflict between the two Courts of Appeals has not arisen since the enactment of the 1984 statute." 113 S. Ct. at 363-364. That situation has not changed. The Ninth Circuit in Frank, and the Fifth Circuit in this case (Pet. App. A2045-A2046), have held that the Act does not address the subject of jury instructions and therefore does not change existing law on the subject. In addition, the Second Circuit has held that the Act does not require an instruction. United States v. Blume, 967 F.2d 45, 49 (1992). Each of the three judges on the Second Circuit panel wrote a separate opinion. Judge Lumbard concluded that the decision whether to give the instruction is left to the discretion of the district judge. Id. at 49. Judge Newman concluded that an

instruction "should always be given unless the defendant prefers its omission." Id. at 50. And Judge Winter concluded that an instruction "should normally not be given," unless the district court has some particular reason to think that the jury may act on a belief that the defendant will go free if acquitted by reason of insanity. Id. at 53-54. The separate opinions in Blume strongly suggest that the Second Circuit has not yet come to rest on this issue, and that review by this Court would therefore be premature.^{1/}

Two other courts of appeals have considered the issue; those decisions, however, have no precedential value because they have been vacated. In United States v. Barnett, 968 F.2d 1189, 1192 (1992), the Eleventh Circuit held that the Act does not compel the giving of such an instruction. The court has ordered that the case be reheard en banc. 989 F.2d 1116 (1993). In United States v. Neavill, 868 F.2d 1000 (8th Cir.), rehearing en banc granted, 877 F.2d 1394 (1989), appeal dismissed, 886 F.2d 220 (1989), a panel of the Eighth Circuit held that passage of the Act mandates the giving of such an instruction. The panel opinion in Neavill has no precedential value, however, because it was vacated and subsequently dismissed.^{2/}

^{1/} In addition, the court of appeals' decision in this case indicates that its position is subject to further development in future cases. See Pet. App. A2046 (noting decision that "permit[s] judges to provide such information * * * in narrow and possibly justifiable circumstances") (emphasis omitted).

^{2/} Petitioner notes (Pet. 7) that some state courts have endorsed the giving of an instruction on the effect of a verdict of not guilty by reason of insanity. The state court decisions

In sum, as petitioner himself admits (Pet. 5), no court of appeals has adopted the position that the Act requires a district court to instruct the jury on the effect of a verdict of not guilty by reason of insanity. Moreover, the law on this issue is still evolving in the courts of appeals. Accordingly, review by this Court at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DEBORAH WATSON
Attorney

JUNE 1993

establish the state law on this issue; they do not conflict with decisions of federal courts establishing federal law.

כטט ט' טנער

RECEIVED

MEMORANDUM

III. SYAD. 2. MED

38925
MANAJA MEN
1209 1310 1320
BOX 930
SMAHNT DHEADYNAKWAH 1231 MEW SLL
TJOUTI SAMHOT

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to be used only for the purpose of
displaying the results of the
surveys and for the use of
the members of the
Society.

CELESTIALS OF SERVICE

UNITED STATES OF AMERICA

A

NO. 25-8349

БЕЛЛИОНЕК ЛЕВА ГЕЕ ЗНУИОН

OCTOBER LEW'S 1885

IN THE SUPREME COURT OF THE UNITED STATES

4
NO. 92-8346

Supreme Court, U.S.
FILED
DEC 16 1993

OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1993

TERRY LEE SHANNON
PETITIONER

VS.

UNITED STATES OF AMERICA
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

Thomas R. Trout 113 West Bankhead Street Post Office Box 630 New Albany, MS 38652 601-534-9098	Drew S. Days, II Solicitor General Department of Justice Washington, D.C. 20530 202-514-2217
Counsel of Record For Petitioner	Counsel of Record For Respondent
Petition for Certiorari Filed April 12, 1993	
Petition for Certiorari Granted November 1, 1993	

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APPENDIX A

DATE CRE90-170-S 1 Master Docket-Multiple Defendant Case
Proceedings Docket for Single Defendant

V. PROCEEDINGS

12/18/90	MOTION (D) For Psychiatric Evaluation (copy given to Judge)	12/18/90	8
12/27/90	AMENDED MOTION(D) For Psychiatric Evaluation (copy given to judge)		9
04/15/91	CJA21 APPROVAL For Psychiatric (court order) Evaluation (original CJA21 mailed to atty for deft)		11
07/15/91	TAPE Of Arraignment held 07/12/91 before Mag. Gillespie.. (tape placed in accord- ion file)		
	ORDER (NLG 07/12/91 Trial set for 09/16/91 in Aberdeen before Judge Senter, Discovery by 07/22/91; & Pretrial Mots by 08/01/91; Plea Agreements by 08/30/91.		13

A-2

PROCEEDINGS (continued)

07/16/91	MOTION(G) for Psychiatric Examination of Deft. (copy given to Judge)	07/16/91	14
07/26/91	ORDER (LTS 07/26/91) That the Motion For Psychiatric Exam is SUS-TAINED. (copies given to USM & ccert. copies of Indict. & Order mailed to MCFP Springfield)	07/26/91	17
09/06/91	NOTICE JURY TRIAL/MVD Have Been Cancelled Until Further Order of the Court.		
02/10/22	JURY TRIAL		
09/27/91	RETURN Deft, delivered to U.S. Penitentiary at Atlanta on 08/03/91 & returned to Laf. Cty. Jail on 09/25/91.	20	

A-3

DATE CRE90-170-S 1 JURY TRIAL

02/10/92

PROCEEDINGS (continued)

11/14/91	NOTICE	Hrg. on Motion of Deft To Determine Competency, 12/03/91 @ 1:30 PM, Oxford before Judge Senter.
	NOTICE	MVD/JURY TRIAL, 01/06/92 @ 9:40 AM, Aberdeen before Judge Senter.
11/15/91	ORDER (LTS 11/14/91)	11/15/91 24 that a competency hrg. be held 12/03/91 @ 1:30 PM in Oxford & that the trial is cont until 01/06/92 @ 9:40 AM in Oxford. Time Excl.
11/20/91	FORENSIC	Evaluation 26
12/19/91	CR/MIN	Competency hrg. held 12/12/91. Court found deft is competent to stand trial. Trial to be reset. 41

A-4

DATE JURY TRIAL CHANGE OF PLEA
02/10/92 SENTENCING 4-16-92

02/14/92 CR/MIN Of Jury Trial held 71

02/10/91 -
02/11/92. Verdict -
Ct. 1 - Guilty.
Deft in custody of
USM. Sent date
left open. Mot of
deft for judgment
of acquittal
DENIED.

JURY INS. GIVEN 74

JURY INS. Refused 92

NOTE From Jury fld 115

02/11/92

VERDICT GUILTY 117

04/21/02 JUDGMENT *(LTS 04/21/92) (sent 129

4/16/92) (J/C BK
#28, pgs. 10-13,
Entered 04/22/92)
Ct. 1 - 15 yrs.
impr. Supervised
Released - 5 yrs.
Special Assess -
\$50.
DKTD 04/22/02

02/04/92 JUDGMENT Issued As Mandate-AFFIRMED 142

SLIP Opinion

04/22/92 NOTICE Of Appeal (copies given to all concerned) 133

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DATE

11/10/93 ORDER

From the Supreme Court of the United States.

156

GRANTING Motion to Proceed in Forma Pauperis and GRANTING Petition for Writ of Certiorari. (Letter from Court of Appeals requesting file be mailed to the Supreme Court). (copies given to all concerned) sjh

MAILED

ORIGINAL PLEADINGS, ETC TO THE SUPREME COURT OF THE UNITED STATES. sjh

A-6

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

FILED
NOV 30, 1990

UNITED STATES OF AMERICA

V.

TERRY LEE SHANNON

CRIMINAL NO. CRE90-170
18 U.S.C. § 922(g)
18 U.S.C. § 924(e)(1)
18 U.S.C. § 3571(b)(3)

INDICTMENT

The Grand Jury charges that:

COUNT ONE

On or about the 25th day of August, 1990, in the Northern District of Mississippi, the defendant, TERRY LEE SHANNON, having previously been convicted of three (3) or more crimes by the Circuit Courts of Lee and Prentiss County, Mississippi, on September 17, 1982, October 28, 1982 and September 6, 1988, each punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce a firearm, to wit: a Sterl-

A-7

ing Arms, 22 L.R. caliber pistol, Serial Number A38815, which had previously been transported in interstate commerce, in violation of Title 18, United States Code, Sections 922(g), 924(e)(1) and 3571(b)(3).

(nm \$250,000 and nl 15 years without probation, parole, or suspension of sentence)

A TRUE BILL

/s/ Curt Jones
FOREPERSON

/s/ Alfred E. Moreton, III
Asst. UNITED STATES ATTORNEY

APPENDIX C

1.05

[75]

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you [76] made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

APPENDIX D

1.21

[81]

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

APPENDIX E

G. 14

[88]

The defendant claims that he was insane at the time of the events alleged in the indictment. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should be found "not guilty only by reason of insanity."

The defendant was insane as the law defines that term only if, as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

On the issue of insanity, it is the defendant who must prove his insanity by clear and convincing evidence. You should render a verdict of "not guilty only by reason of insanity" if you are persuaded by clear and convincing evidence that the defendant was insane when the crime was committed.

Remember, then, that there are three possible verdicts in this case: guilty, not guilty, and not guilty only by reason of insanity.

THIS IS 1.33 of
5th Cir. Patterns

APPENDIX F

We want you to explain the reason of insanity.

Filed

This 11 day of Feb., 1992

Norman L. Gillespie, Clerk

By: /s/ Eugene F. Bradley

Deputy Clerk

Steve Autry

02/11/92

APPENDIX G

[115] TO THE MEMBERS OF THE JURY:

In response to your request, I am enclosing the instruction of law on insanity that I read to you in the courtroom.

This instruction is to be considered by you with all other instructions I orally gave you during the charge.

Date: Feb. 11, 1992

/s/ L. T. Senter, Jr.

CHIEF JUDGE

[116] The defendant claims that he was insane at the time of the events alleged in the indictment. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should be found "not guilty only by reason of insanity."

The defendant was insane as the law defines that term only if, as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

On the issue of insanity, it is the defendant who must prove his insanity by clear and convincing evidence. You should render a verdict of "not guilty only by reason of insanity" if you are persuaded by clear and convincing evidence that the defendant was insane when the crime was committed.

Remember, then, that there are three possible verdicts in this case: guilty, not guilty, and not guilty only by reason of insanity.

APPENDIX H

[117]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF MISSISSIPPI

FILED
FEB 14 1992

UNITED STATES OF AMERICA

V.

VERDICT
CASE NUMBER:
CRE 90-170-S

TERRY LEE SHANNON

WE, THE JURY, FIND:

The defendant Terry Lee Shannon as to Count 1 of the Indictment

GUILTY

**PLEASE PLACE ONE OF THE FOLLOWING IN THE SPACE PROVIDED:

- 1) Guilty
- 2) Not Guilty
- 3) Not Guilty Only By Reason of Insanity.

/s/ Steve A. Autry

FOREPERSON'S SIGNATURE

2/11/92

DATE

APPENDIX I

[129]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF MISSISSIPPI

FILED
APR 21 1992UNITED STATES OF
AMERICAJUDGMENT IN A
CRIMINAL CASE
(for Offenses Committed
On or After November 1,
1987)

V.

TERRY LEE SHANNON

Case Number:
CRE90-170

(Name of Defendant)

Thomas Trout

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

was found guilty on count(s) 1 after a
plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>
18/922(g)(1) and 924 (e)(1)	POSSESSION OF A FIREARM BY A PERSON WITH THREE (3) PRIOR CONVICTIONS PUNISHABLE BY TERM OF IM- PRISONMENT EXCEEDING ONE (1) YEAR
<u>Date Offense</u>	<u>Count</u>
08/25/90	1
<u>Concluded</u>	<u>Number(s)</u>

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

Count(s) _____ (is)(are)dismissed on the motion of the United States.

It is ordered that the defendant shall pay a special assessment of \$ 50, for count(s) 1, which shall be due immediately as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

A-14

Defendant's Soc. Sec. No.: 587-42-1839

Defendant's Date of Birth: 03/04/54

Defendant's Mailing Address:
526 NORTH GREEN
TUPELO, MS 38801

Defendant's Residence Address:
526 NORTH GREEN
TUPELO, MS 38801
J/C BK #28

APRIL 16, 1992

Date of Imposition of Sentence

/s/ illegible

Signature of Judicial Officer

L.T. SENTER, JR.,
CHIEF U.S. DISTRICT JUDGE

Name & Title of Judicial Officer

4/21/92

Date

Entered 4/22/92

A-15

APPENDIX J

[130]

Defendant: TERRY LEE SHANNON
Case Number: CRE90-170

Judgment-Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTEEN (15) YEARS.

The Court makes the following recommendations to the Bureau of Prisons:

THE COURT RECOMMENDS THAT THE DEFENDANT BE INCARCERATED IN A FACILITY WHERE HE CAN RECEIVE MENTAL HEALTH TREATMENT AND THERAPY.

The defendant is remanded to the custody of the United States marshal.

The defendant shall surrender to the United States marshal for this district,

a.m.

at _____ p.m.

on _____

as notified by the United States marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

before 2 p.m. on _____
 as notified by the United States marshal.
 as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

 United States Marshal

By: _____
 Deputy Marshal

[131]

Defendant: TERRY LEE SHANNON

Case Number: CRE90-170

Judgment-Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- The defendant shall not possess a firearm or destructive device.

THE DEFENDANT SHALL PARTICIPATE IN A PROGRAM FOR THE TREATMENT OF SUBSTANCE ABUSE, TO INCLUDE TESTING TO DETERMINE WHETHER OR NOT THE DEFENDANT HAS REVERTED TO THE USE OF DRUGS OR ALCOHOL, UNDER THE DIRECTION OF THE PROBATION OFFICER.

THE DEFENDANT SHALL PARTICIPATE IN A MENTAL HEALTH PROGRAM APPROVED BY THE PROBATION OFFICER.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an enformer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

[132]

Defendant: TERRY LEE SHANNON

Case Number: CRE90-170

Judgment-Page 4 of 4

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 10

Criminal History Category: VI

Imprisonment Range: 15 years

Supervised Release Range: 3 to 5 years

Fine Range: \$ 2,000 to \$20,000

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ _____

Full restitution is not ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

upon motion of the government, as a result of defendant's substantial assistance.

for the following reason(s):

APPENDIX K

JURY INSTRUCTION CONFERENCE [254]

THE COURT: All right. Sylvia. Tom, you got anything else?

MR. TROUT: Yes, your Honor, I do. The last question, Your Honor, is — I have the instruction roughed out — is the issue of what the jury knows or should know about punishment. I mean, excuse me, about what would happen to the defendant in the event that he is found not guilty only by reason of insanity. And it seems to me that we need an [255]instruction, which I request, somewhat in this terminology that "In the event it is your verdict that the defendant is not guilty only by reason of insanity, it is required that the Court commit the defendant," or perhaps it should say "you should know that it is required that the Court commit defendant to a suitable hospital facility until such time as the defendant does not pose a substantial risk of bodily injury to another or serious damage to the property of another."

THE COURT: By the way, what is the law?

MR. MARTIN: The law is, as we can determine it, Judge, and we've got one brand new case from March of '91 just out of the Vermont District. We do have a Fifth Circuit case and another out of the Eleventh Circuit that says it's not supposed to be mentioned. Cannot mention it.

MR. TROUT: What cases do you have?

THE COURT: Is that just punishment or does that go to —

MR. MARTIN: What would happen in the event of a not guilty by reason of insanity. Just can't be mentioned.

MR. BUCHANAN: Said they're only concerned with guilty or innocence, not to any punishment whatsoever.

MR. MARTIN: *United States v. Beioncheny*, 759 F.Supp. 1081, March 18th, 1991. And the Eleventh Circuit is *Boykins v. Wainright*, which is September 7th, '84. That's the Eleventh Circuit. And both states the same thing.

[256] MR. TROUT: All right. The '84 decision is going to predate—is it under the Act as it now reads, the '84 decision, the Eleventh Circuit decision?

MR. MARTIN: Yes. As far as stating that the trial court erred in refusing to instruct the jury on consequences of a verdict of not guilty by reason of insanity does not deny the petitioner of a fundamental fair trial.

MR. TROUT: I've got some cases, Your Honor, I want to call to the Court's attention on this. The Eighth Circuit has done something that's a little bit unusual. They, in the case of *United States v. Neavill*, 868 F.2d 1000, the Eighth Circuit decided that the defendant was entitled to have an instruction go to the jury informing them what would happen to him in the event they found him not guilty only by reason of insanity.

Now, that decision was vacated and for an en banc consideration. After that, vacating the decision, the defendant dismissed his appeal. Sounds to me like the United States of America was at work there. So the government probably gave him some kind of special deal so they didn't have this precedent come down. But, in any event, whatever happened, after the decision was vacated, there was no en banc rehearing because the appeal was dismissed.

Now, later, in *United States v. Kristianse*, which is 901 F.2d 1463, Eighth Circuit, 1990 decision, the Eighth [257]Circuit cited — well, they cited *United States v. Neavill* and approved a trial court's instruction to the jury informing them of what would happen in the event of not guilty by reason of insanity.

THE COURT: They cited a vacated.

MR. TROUT: Yes, sir. In the footnote, the footnote says the instruction was based on *U.S. v. Neavill*, which held that an instruction explaining the consequences of acquittal by reason of insanity must be given. Rehearing en banc was granted vacating the panel opinion. We subsequently granted Neavill's motion to dismiss the appeal entirely. That's all they say down here.

THE COURT: It's the same circuit.

MR. TROUT: It's the same circuit. And they approved, my reading of the case, they approved what they had done in *United States v. Neavill*. And that the trial court in this case — I don't want to overstate what the Court did, Your Honor.

THE COURT: Let me tell you what the problem with it is. It's one thing to simply say that in the event, you know, you find the defendant not guilty only by reason of insanity, the Court will commit him. That's just not the end of it. The statutory scheme goes on to tell how a defendant, you know, it's got to be reviewed first of all. His commitment, how he may petition the Court, the Court appoint counsel and experts [258]to examine him and conduct a hearing to see whether or not he has regained his mental faculties to the point where he doesn't pose a danger to others, and what have you. You see, it really would be something that would have to be carefully thought out, if that type thing were allowed.

Is that the only circuit that you could find?

MR. TROUT: Yes, sir. I didn't—Your Honor, the Eleventh Circuit decision, I believe that the government's referring to, if I'm not mistaken, that case dealt with an offense which took place before the Insanity Reform Act actually came into play. So they found in that decision, if I'm not mistaken, that that defendant just didn't come within the terms of the Act. So they never had to address whether an offense committed after that date would permit or require such an instruction.

And I will say this, that in this case that I have just called to the Court's attention, the Eighth Circuit case, *Kristiansen*, the Eighth Circuit, in my view, approved of the trial court's giving the instruction in that decision which informed the jury of what would happen to the defendant in the event that he was found not guilty only by reason of insanity. It appears to me, despite the Eighth Circuit's vacating of their decision —

THE COURT: Okay. You got your point across. Let me hear the response.

[259]MR. MARTIN: Judge, we do have some Fifth Circuit cases. They're older cases. One is from 1970, *United States v. Deltoro*, 426 F.2d 181. And the other one is *United States v. McCrackin*, found at 488 F.2d 406. And both of them say, they have been, to my knowledge, have been Shepardized and are still good law, that it is the jury's province to decide guilty or not guilty. And the question of sentencing or anything occurring thereafter should not come into play. That is not within their province. It's not a issue of guilty or not guilty.

THE COURT: I think it is entirely inconsistent. You know, I can understand a defendant wanting, in some instances, the jury to know that he's going to be put away when you say that. But, you know, that is inconsistent with the Court's teachings, the Appellant Court telling the trial courts that, you know, it is the jury's function to determine guilt or innocence or not guilty only by reason of insanity. To me it's inconsistent to say they ought to be told what's going to happen. The same rationnale would be, well, they ought to be told if this man's just a first offender, well, he has a likelihood of probation or one or two years or what have you. And that's simply not the law.

I'm going to refuse to grant an instruction telling the jury what will happen to this defendant if — or what the law on insanity is in the event they should bring back a not [260] guilty only by reason of insanity verdict.

MR. TROUT: Your Honor, I have not submitted a

written instruction. I dictated one which the court reporter took a moment ago. Is that satisfactory?

THE COURT: Yes, I think you've clearly made your record, and I'm making a record right now, and it's going to be up to the judgment of three judges on the Court of Appeals to see whether or not they want to, shall we say, change or restructure the law of the Fifth Circuit and of the country. If they want to, it's fine with me.

Anything else? We have now been 45 minutes in this jury instruction conference. We've got a jury waiting, so let's move on. Are you ready?

MR. TROUT: Yes, sir.

Court's Charge To Jury

[261]Now, you as jurors are the judges of the facts. But in determining what actually happened, that is, in reaching your decision as to the facts, it is your sworn duty to follow all of the rules of law as I explain them to you. You have no right to disregard or give special attention to any one instruction or to question the wisdom or correctness of any rule I may state to you. You must substitute or follow [262] your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you regardless of the consequence.

It is also your duty to base your verdict solely upon the evidence without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors. And they have the right to expect nothing less from you.

[268]

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

[269] The defendant claims that he was insane at the time of the events alleged in the indictment. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should be found not guilty only by reason of insanity.

The defendant was insane as the law defines that term only if as a result of a severe mental disease or defect the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

On the issue of insanity, it is the defendant who must prove his insanity by clear and convincing evidence. You should render a verdict of not guilty only by reason of insanity if you are persuaded by clear and convincing evidence that the defendant was insane when the crime was committed.

Remember then that there are three possible verdicts in this case: Guilty, not guilty, and not guilty only by reason of insanity.

APPENDIX L

UNITED STATES of America,

Plaintiff-Appellee,

v.

Terry Lee SHANNON,

Defendant-Appellant.

No. 92-7294.

United States Court of Appeals,

Fifth Circuit.

Jan. 12, 1993.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WILLIAMS, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Terry Lee Shannon appeals his conviction for firearm possession. Shannon pleaded insanity at his trial, and the district court instructed the jury on the insanity defense. The court, however, refused to instruct the jury about the mandatory commitment procedures that accompany a jury verdict of "not guilty only by reason of insanity" ("NGI"). Shannon contends that the court's refusal to reveal the required disposition of a defendant acquitted because of his

insanity was error in light of the Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241-4247 ("IDRA" or "Act"). We affirm the district court's decision. We agree that district courts possess no discretion to offer such instructions.

I. FACTS AND PRIOR PROCEEDINGS

The principal facts are uncontested and largely stipulated. At about 4:00 a.m. on the morning of August 25, 1990, Sergeant Marvin Brown of the Tupelo Police Department was on roving patrol and stopped Shannon as he walked down a Tupelo street. The officer told Shannon that a detective wanted to speak with him and asked Shannon to accompany him back to the station. Shannon then told Sergeant Brown that he did not want to live anymore, whereupon he walked across the street, pulled a pistol from his coat or shirt, and shot himself in the chest. The wound was not fatal.

Shannon had acquired the gun the day before from his son, with whom Shannon had ridden to the Tupelo Airport where his son was catching a return flight to New York. When Shannon learned his son was planning to board the plane with the pistol, he retrieved it because he knew it was unlawful to go through airport security with a firearm. Shannon also knew as a prior convicted felon that he could not lawfully possess a firearm himself, and he later stated that he had planned to carry the gun to his mother's house until he could deliver it to his parole officer.

In the early morning hours of August 25, Shannon had left his girlfriend's house and began walking to his

mother's house, purportedly to leave the gun with her. Before he reached the house, he had been stopped and questioned by Sergeant Brown, and this led to Shannon shooting himself. He was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

Before trial, the defense moved to have Shannon declared mentally incompetent to stand trial.¹ The court scheduled a competency hearing, heard expert testimony regarding Shannon's ability to participate in his trial, and concluded that he was able "to understand the nature and consequences of the proceedings against him and to assist properly in his defense." The case proceeded to trial on the defense of insanity. Shannon concedes that the Government presented evidence at trial that, if believed by the jury, was sufficient to prove the essential elements of the crime charged. The jury's role then became the consideration of Shannon's insanity defense.

Shannon concedes he "unquestionably knew as an abstract proposition that it was unlawful for him to possess a firearm." He urges, however, that the question remains whether he appreciated the wrongfulness of his acts under the circumstances prevailing at the time of the offense. Dr. Richard G. Ellis, a psychologist with the Bureau of Prisons, and Dr. Michael D. Roberts, a local clinical psychologist, testified at Shannon's trial regarding

¹ 18 U.S.C. § 4241, Determination of mental competency to stand trial, establishes the procedure for evaluating whether a defendant is "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."

his mental condition at that time. The precise nature of their diagnoses differed, but they both agreed that Shannon suffered from mental illness at the time of trial and possibly at the time of the shooting. Despite their acknowledgment of Shannon's chronic mental problems, however, the experts agreed that Shannon's mental illness was not so severe as to render him legally insane at the time of the offense and thus unable to appreciate the nature, quality, and wrongfulness of his actions.

The court properly instructed the jury on the insanity defense.² It refused Shannon's request to inform the jury that an NGI verdict would result in Shannon's involuntary commitment in accordance with §4243(e) of the IDRA.³ The jury rejected Shannon's insanity defense and

² The district court defined "insanity" as follows: "The defendant was insane as the law defines that term only if, as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfullness of his acts. Mental disease or defect does not otherwise constitute a defense." This definition comports with the statutory provisions of 18 U.S.C. § 17.

³ Section 4243(e) ensures that a federal criminal defendant found not guilty by reason of insanity will not be released onto the streets. It provides that "the Attorney General shall hospitalize the person for treatment in a suitable facility" until a State assumes responsibility for the defendant's care and treatment or until it can be certified that his release will not pose a substantial danger to others or to property.

Shannon's counsel attempted to make this a mandatory confinement known to the jurors. During a jury instruction conference, counsel suggested two alternative instructions: (1) "In the event it is your verdict that the defendant is not guilty only by reason of insanity, it is required that the Court commit the defendant," or (2) "[Y]ou should know that it is required that the Court commit defendant to a suitable hospital facility until such time as the defendant does not pose a substantial risk of bodily injury to another or serious danger to the property of another." The trial judge rejected both versions.

returned a guilty verdict. Because Shannon already had three previous convictions, the district court sentenced him to serve fifteen years without the possibility of probation or parole pursuant to 18 U.S.C. § 924(e)(1). Shannon's appeal is timely.

II. DISCUSSION

This case presents a single issue: did the district court err in refusing to instruct the jury that Shannon would be committed until he was no longer dangerous if the jury found him "not guilty only by reason of insanity"? The issue arises because it is urged that the established law was changed by the IDRA of 1984.

A. The Law Before the 1984 Act

[1] The well-established general principle is that a jury has no concern with the consequences of its verdict. As the Supreme Court stated succinctly in *Rogers v. United States*, "the jury [has] no sentencing function and should reach its verdict without regard to what sentence might be imposed." 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975). This Circuit has long recognized that punishment and sentencing are matters entrusted exclusively to the trial judge. We have held specifically that juries should not ordinarily be informed about the consequences of an NGI verdict. See *United States v. McCracken*, 488 F.2d 406, 423 (5th Cir.1974) ("Except where a special provision mandates a jury role in assessment or determination of penalty, the punishment provided by law for offenses charged is a matter exclusively for the court and should not be considered by the jury in arriving

at a verdict as to guilt or innocence.”).

[2] *McCracken*, a pre-IDRA case, posed an issue similar to the one we face today. We reversed the defendant’s murder conviction because the trial court instructed the jury that if it returned an NGI verdict, the defendant would be freed. The jury charge embodied a then-accurate statement of the law; no federal statutory scheme yet provided for the disposition of defendants acquitted due to insanity. We recognized, however, that the court’s instruction possibly served to coerce or induce a guilty verdict since jurors at that time were assumed to be fearful of those with mental illness and might convict insane defendants based upon a perceived need to protect society rather than face the risks resulting from their immediate release onto the streets. We lamented that the absence of federal commitment procedures led to heavy reliance upon state authorities to institute commitment proceedings against those acquitted by reason of insanity. We labelled such dependence one of the “the harsh effects of the federal statutory silence.”

In the *McCracken* opinion, we noted the District of Columbia Circuit’s decision in *Lyles v. United States*, 254 F.2d 725, 7281 (D.C.Cir.1957) (en banc), *cert. denied*, 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067 (1958). In *Lyles*, a divided court held that a jury should be informed that such an NGI verdict would result in defendant’s involuntary commitment. But a key feature distinguished *Lyles*. The case arose under the D.C.Code, which Congress had amended to provide for mandatory commitment of a defendant

who asserted a successful insanity defense.⁴ Despite our apparent appreciation for such a statute, we noted that the absence of comparable federal legislation made the D.C. Circuit’s approach inapposite for other circuits. *McCracken*, 488 F.2d at 422. We therefore concluded in *McCracken* that, absent an explicit statutory directive mandating an enhanced jury role, it was inappropriate for jurors to consider possible post-trial punishments. *Id.* at 423.

McCracken was a natural descendant of our earlier decision in *Pope v. United States*, 298 F.2d 507 (5th Cir.1962), *cert. denied*, 381 U.S. 941, 85 S.Ct. 1776, 14 L.Ed.2d 704 (1965). In *Pope*, we affirmed the trial court’s refusal to inform the jury about what would occur if they found *Pope* “not guilty only by reason of insanity.” There too, we expressly rejected the *Lyles* approach, holding that “[d]ifferent rules and different statutes apply to the Courts of the District of Columbia.” *Id.* at 509. Emphasizing our long-standing focus on the unique duties of judges and juries, we said:

Unless otherwise provided by statute, it is the duty of the court to impose sentence, or make such other disposition of the case as required by law, after the facts have been decided by the jury. To inform the jury that the court may impose minimum or maximum sentence, will or will not grant probation, when a defendant will be eligible for a parole, or other matters relating to disposition of the defendant, tend to draw the attention

⁴ The Code provision did not by its own terms mandate the giving of such an instruction. See *Lyles*, 254 F.2d at 728-729.

of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided. In a case of this nature what they were to decide was whether the defendant was guilty or not.

Id. at 508 (emphasis added).

B. The IDRA's Impact

Shannon argues strongly that the trial court's ruling left the jury with no guidance as to the actual implications of its verdict. As a result, the confused jury fell captive to the misconception that only two real options existed—guilty (go to jail) or not guilty/NGI (go free). Because they feared that a dangerous, mentally-ill person would be released if they returned an NGI verdict, they were induced to reject his insanity defense, however meritorious it may have been.⁵ Appealing to the *McCracken* court's concern that uninformed and frightened juries might convict while still questioning a defendant's sanity, Shannon urges us to apply "common sense and justice".⁶

⁵ Shannon has not shown that in deliberating, the jury in this case actually entertained these misconceptions, failed to follow the judge's instructions, or considered extraneous factors that colored its verdict.

⁶ The instruction Shannon desires could actually work to his disadvantage and cause him more harm than good. As the Third Circuit perceptively noted in *Government of V.I. v. Fredericks*: "A juror who is convinced that a defendant is dangerous, but who believes [the defendant] did not ... commit the [offense] charged, might be willing to compromise on a verdict of not guilty by reason of insanity rather than insist on an acquittal." 578 F.2d 927, 936 (3d Cir.1978). Moreover, a jury could assume that due to overcrowded mental hospitals, strapped social services budgets, sympathetic judges, etc., a defendant will be released

Shannon asserts that Congress's passage of the IDRA constitutes a statutory change that mandates, or at least authorizes, the instruction he seeks. Because the justification for a different rule in different parts of the federal system has now been removed, Shannon argues, the practice announced in *Lyles* must now be applied nationwide. We must disagree that the IDRA alters the calculus. The statute enacted a comprehensive scheme for dealing with insanity in federal criminal cases. Yet it has no provision expanding the jury's role. It has no wording that even touches upon this role. It leaves the jury solely with its customary determination of guilt or innocence.

For support, Shannon cites the Eighth Circuit's opinion in *United States v. Neavill*, 868 F.2d 1000 (8th Cir.), vacated, *reh'g en banc granted*, 877 F.2d 1394 (8th Cir.), *appeal dismissed*, 886 F.2d 220 (8th Cir.1989). In *Neavill*, the panel found that the IDRA permitted it to re-examine former precedent, in which the court had joined this Circuit and others in rejecting the *Lyles* rationale. In reaching its decision, the court relied heavily on a Senate Committee report that endorsed the D.C. Circuit's rationale:

The [Senate] Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If a defendant

footnote 6 continued.

after only a short period of commitment. To combat the prospect of early release, the jury could simply opt to find him guilty. The mandatory instruction Shannon seeks, therefore, seems to be fraught with the same prejudice and jury confusion he wants to avoid.

requests that the instruction not be given, it is within the discretion of the court whether to give it or not.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 240, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3422 (footnotes omitted). *Neaville*, however, has no current precedential value. As the citation makes clear, it was vacated by operation of law when rehearing *en banc* was granted and then was dismissed at Neavill's request prior to reconsideration by the full Circuit.

Shannon likewise emphasizes the Act's legislative history and insists that it illustrates Congress's intentions. We agree, however, with the Ninth Circuit's refusal to disregard the statute's clarity by embracing the committee report:

This statement does not have the force of law nor does it purport to interpret or explain ambiguous language in the statute regarding instructions. *See International Brotherhood of Electrical Workers Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C.Cir.1987) ("While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an *independent source having the force of law....* [C]ourts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point." (emphasis in original) (citations omitted)). *United States v. Frank*, 956 F.2d 872, 881 (9th Cir.1991), cert. denied, ____ U.S. ___, 113 S.Ct.

363, 121 L.Ed.2d 276 (1992).⁷

In *McCracken*, 488 F.2d at 423, we said that a specific statutory provision was required to justify an enhanced jury role. We do not have it here. The IDRA does not expressly provide that a jury be instructed regarding mandatory commitment procedures. In contrast, Congress explicitly dealt with what juries should be told by way of instruction when a psychiatric defense is raised. 18 U.S.C. § 4242(b) provides:

If the issue of insanity is raised ... *the jury shall be instructed to find*, or, in the event of a nonjury trial the court shall find the defendant

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of insanity. (emphasis added)

It is noteworthy that Congress was explicit in directing what issues should be raised, yet said nothing about informing juries of the consequences of any of the three choices. Courts may not properly attempt to discern what Congress, while remaining quiet, assumed would happen. Absent an affirmative statutory requirement that juries be granted a sentencing role, we adhere to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict.

⁷ Justice Stevens wrote an opinion "respecting the denial" of the writ of certiorari in *Frank*. He stated that the rule should be that the district court must give the disputed instruction to the jury.

Finally, the other peripheral sources that Shannon cites for support are likewise devoid of statutory anchors and do not compel a different result. Specifically, Shannon notes that the ABA Standards address the issue and recommend that the proposed instruction be given. II ABA Standards for Criminal Justice No. 7-6.8 (2d ed. 1986). Moreover, he insists that the prevailing trend among the states favors requiring or authorizing the instruction. Thomas M. Fleming, Annotation, *Instructions in State Criminal Case in which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 A.L.R. 4th 659, 667 (1990). These sources are no authority to abandon our long-standing precedents without congressional mandate. Our decision today is grounded upon the traditional roles of judges and juries and rooted in the Act's plain language.

Three other circuits have examined the issue. None has taken the passage of the Act to mandate such an instruction. *Frank*, 956 F.2d at 881; *United States v. Blume*, 967 F.2d 45, 49 (2d Cir.1992); *United States v. Barnett*, 968 F.2d 1189, 1192 (11th Cir.1992). Two of the Circuits permit judges to provide such information, one in narrow and possibly justifiable circumstances and the other more broadly.

In *Frank*, a divided panel of the Ninth Circuit affirmed the district court's refusal to instruct the jury on the effect of an NGI verdict, holding that the IDRA fails to enlarge the jury's role beyond the traditional guilt/innocence determination. But the Court qualified its holding, concluding that "prosecutorial misconduct" which suggests that those persons found innocent by reason of in-

sanity are released into society properly may warrant a curative instruction to correct the error and abate jury anxiety or confusion. 956 F.2d at 881. In *Barnett*, the Eleventh Circuit followed the holdings of *Rogers* and *McCracken*: "Punishment, or the lack thereof, is a matter entrusted to the trial judge." 968 F.2d at 1192. The opinion does not expressly discuss whether instructional discretion exists in certain cases, but seems to intimate that it does not. A recent panel of the Second Circuit was also divided on the issue. *Blume*, 967 F.2d at 50. Judge Lombard, writing for the Court, stated that the Senate Committee report's language leaves the instructional decision to the district court's discretion; Judge Newman, writing separately, urges that the instruction should always be given unless the defendant requests its omission, but he adjusted his position to join Judge Lombard and give the court a majority position in favor of the discretionary approach. Judge Winter, also concurring separately in the result but disagreeing with the NGI analysis, seems to adopt a variety of the *Frank* rationale, urging that the instruction typically should not be given unless the jury has evinced a belief that those acquitted NGI usually go free.

We adhere to our established precedents since there is no statutory directive that opens up to juries a role in the assessment or determination of penalties. We properly are concerned about possible unfortunate consequences of any alteration of the traditional role of the jury. We are convinced that a carefully limited and precise statutory mandate must be required. There is none here.

III. CONCLUSION

We find the established law unchanged by the 1984 Insanity Defense Reform Act. The district court acted properly in refusing an instruction stating the consequences of finding the accused not guilty only by reason of insanity.

AFFIRMED.

No. 92-8346

Supreme Court, U.S.

FILED

DEC 16 1993

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TERRY LEE SHANNON,
Petitioner

v.

UNITED STATES

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner entitled to an instruction that if he was found not guilty solely by reason of insanity ("NGI"), he would be committed until he was no longer a threat to the safety of others or their property?
2. Was D.C. Code § 24-310 the model statute employed by Congress to draft that portion of the Insanity Defense Reform Act of 1984 ("IDRA") relevant to the questions presented by this case?
3. If so, did Congress intend that the Federal Courts applying the IDRA adopt the practice followed in the District of Columbia Circuit of instructing the jury on the disposition of the defendant in the event he was found NGI?
4. What rule should this Court adopt as most consistent with the purpose of the IDRA and the pursuit of justice regarding the grant of an instruction informing the jury that a defendant acquitted solely on the ground of insanity will be committed until such time as he is no longer a danger to others or their property?

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CITATION OF THE OPINION BELOW

The decision of the Court of Appeals for the Fifth Circuit in this case is reported as *United States v. Shannon*, 981 F.2d 759 (5th Cir. 1993). There is no other written opinion.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

This case originated in the United States District Court for the Northern District of Mississippi, Eastern Division, which asserted jurisdiction pursuant to 18 U.S.C. § 3231. The indictment charged Petitioner with the illegal possession of a firearm by a prior convicted felon (J.A. 1). Following entry of a judgment of conviction on April 22, 1992 (J.A. 12), the Petitioner later on that same date filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit (R I, 133).¹

The judgment of the District Court was affirmed by the Fifth Circuit on January 12, 1993. (J.A. 29). No petition for rehearing was filed. The Petitioner filed a Petition for Certiorari in this Court 90 days later on April 12, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Statutes involved in the case are as follows: The Insanity Defense Reform Act of 1984,² and D.C. Code § 24-301, which governs the insanity defense in the District of Columbia.³

¹ References to the Record will be by volume number and page number, i.e. (R. I, 133).

² The IDRA consists of 18 U.S.C. §§ 17, 4241-4247, all of which are reproduced in full in Appendix A to this Brief.

³ D.C. Code § 24-310 is reproduced in full in Appendix B to this Brief.

STATEMENT OF THE CASE

Statement of Proceedings in the District Court

The defendant was indicted for having possessed a firearm, being a prior convicted felon. The indictment charged that the defendant had been convicted of at least three prior felonies and was subject to the enhanced punishment of not less than fifteen years imprisonment, without probation or parole. (R. I, 1).

Arraignment was delayed while the defense obtained a psychological evaluation of the defendant. After the evaluation was concluded, the defense entered pleas of not guilty and not guilty by reason of insanity. (R. I, 13).

The Government then obtained an order to have the defendant evaluated (R. I, 26), and the report of the Government evaluation by Dr. Richard Ellis was completed and filed in the record. (R. I, 26).

The defense moved to have the defendant declared mentally incompetent to stand trial, but following a hearing the Court overruled this motion. (R. I, 57).

The case proceeded to trial on the defense of insanity. Two clinical psychologists testified, Dr. Ellis, the Government psychologist, and Dr. Roberts, the psychologist appointed for the defense.

At the close of the evidence, the Court instructed the jury on the defense of insanity (J.A. 9). The instruction, Number G-14, given at the request of the Government (R. II, 246-47), stated in general the elements of the defense and the petitioner's burden of proof in accordance with the IDRA. (J.A. 9).

The court refused to grant the defense any instruction on the disposition that would be made with the defendant under the IDRA in the event the jury found him NGI. (J.A. 22-28). The court grounded its refusal on what it viewed as the settled state of Fifth Circuit authority disapproving any such instruction. (J.A. 26-27).

Following the retirement of the jury to deliberate on its verdict, the foreperson sent the following note back to the court: "We want you to explain the reason of insanity." (J.A. 9). In response, the court simply reiterated its prior instruction, No. G-14. (J.A. 10).

The jury returned a verdict of guilty (J.A. 11) on which judgment was entered, and the Court sentenced the defendant to serve 15 years without the possibility of probation or parole. (J.A. 15).

Statement of Facts

In its case in chief at trial, the government submitted sufficient evidence, if believed by the jury, to prove beyond a reasonable doubt the following essential elements of the crime charged: (a) that the defendant Terry Lee Shannon did possess on August 25, 1990, within the boundaries of the Northern District of Mississippi a Sterling Arms .22 long rifle pistol, (b) that the pistol had moved in interstate commerce, and (c) that prior to possessing the pistol Terry Lee Shannon had been convicted of a felony crime punishable by a sentence of more than one year in prison. The principal issue for determination by the jury was the defense of insanity.

On the date alleged in the indictment, Sergeant Marvin Brown of the Tupelo, Mississippi Police Department stopped the defendant in the early morning hours while defendant was walking down a street. Upon being stopped, defendant walked across the street to the police car. After being told he would need to accompany the officer back to the station, the defendant told the officer he did not want to live anymore, whereupon he walked back across the street, reached inside his coat and pulled out a pistol with which he shot himself in the chest. In doing this the defendant did not threaten the officer by word or action. (R. II, 66-70). The indictment resulted from the defendant's possession of the pistol with which he shot himself.

The defendant had acquired the pistol earlier in the day from his son, with whom he had ridden in an automobile to the Tupelo airport in order for his son to catch an airplane back to New York. When defendant learned that his son intended to board the aircraft with the pistol, defendant took the pistol away from his son because he knew it was unlawful to go through airport security with a pistol, and he did not want his son to get into difficulty with the law. (R. II, 178, 189, 219).

After obtaining the pistol, defendant expressed his intention to others to deliver the pistol to his parole officer. He had previously had possession of a shotgun which he had delivered to his parole officer without adverse action being taken against him either by the State or Federal authorities. (R. II, 107-08).

In the early morning hours of August 25th, defendant left his girl friend's house walking down the street going to his mother's house. He believed he could safely leave the pistol at his mother's house until he could deliver it to his parole officer. (R. II, 142-43). Before he reached his mother's house, he was stopped and questioned by Sergeant Brown, resulting in defendant shooting himself and his arrest for the offense charged.

Dr. Ellis, an employee of the Bureau of Prisons, and Dr. Roberts, a local psychologist, both of whom held doctorate degrees in clinical psychology, testified regarding the defendant's mental condition at the time of the offense. Both witnesses agreed that the defendant suffered from a serious mental illness at the time of trial, at the time of the offense, and for some years before. (R. II, 188, 218). The witnesses differed about the precise nature of the diagnosis, Dr. Ellis having provisionally diagnosed organic delusional brain disorder (R. II, 88) and Dr. Roberts schizophrenia (R. II, 213).

Both witnesses agreed that at times the defendant suffered from paranoid delusions of a persecutory nature and

hallucinations, which became more likely when the defendant encountered a stressful situation. (R. II, 88, 216).

Dr. Ellis testified that his intellectual functioning was in the borderline range of mental retardation, and that his actual functioning was substantially below what would be expected from one with borderline retardation. (R. II, pp. 176-77).

Both psychological witnesses agreed that due to the defendant's chronic mental problems, he was an extreme suicide risk when under stress, his history indicating that he had made numerous suicide attempts in the past. (R. II, 190-192, 218). When confronted by Sergeant Brown, the defendant again attempted suicide, indicating the degree of stress the defendant was under at the time. (R. II, 191).

When not suffering from delusions or hallucinations, the defendant unquestionably knew as an abstract proposition that it was unlawful for him to possess a firearm. The question remained whether he appreciated the wrongfulness of his acts under the circumstances prevailing at the time of the alleged offense.

Dr. Ellis testified that in order to understand whether the defendant appreciated the wrongfulness of his conduct, one should consider the defendant's ability to comprehend his actions within three frames of moral reference: 1) the requirements of the law, 2) the standards of the defendant's community, and 3) the dictates of his own conscience. (R. II, 199). While apparently contradicting some of his earlier testimony, Dr. Ellis concluded his testimony by stating that from the defendant's perspective at the time, the defendant was complying with community and personal morality in taking possession of the pistol and protecting his son. (R. II, 205-06). The defendant was also doing what he felt was legally correct in trying to return the pistol to his parole officer via his mother. (R. II, 207).

BRIEF OF THE ARGUMENT

Prior to the passage of the Insanity Defense Reform Act of 1984, the law in the District of Columbia Circuit regarding the defense of not guilty by reason of insanity was very different than prevailed in all the other federal circuits. The District of Columbia Circuit was governed by a statute, D.C. Code § 24-310, which specifically provided for a not guilty verdict solely by reason of insanity, while in all the other circuits there was no such special verdict. D.C. Code § 24-310 provided for continuing judicial control over an accused acquitted because of insanity. The other federal circuits had no such protection.

With this background, Congress adopted IDRA and closely modeled its provisions and structure on the District of Columbia statute. While the defense is somewhat more difficult to assert successfully under IDRA than § 24-310, there is no doubt that § 24-310 is the parent of IDRA.

Under § 24-310 the settled construction of the statute at the time of the adoption of IDRA, and since, provided that the defendant had an absolute right at his option to instruct the jury that in the event of an NGI verdict, he would be committed to a mental hospital until such time as he no longer posed a risk to himself or others.

Under IDRA most circuits which have considered the question have refused to adopt the practice of the District of Columbia Circuit in permitting such an instruction, they are without the authority to do so, except in juries ordinarily have no concern with the disposition made by the court with an accused following the jury verdicts. They have also stated that in the absence of a plain Congressional directive to grant such an instruction. They have justified their positions by stating that certain unusual circumstances.

In so ruling, these courts have overlooked an established canon of statutory construction which holds that when a legislative body adopts a statute from another jurisdiction as its model, it is presumed in the absence of contrary evidence to have incorporated the authoritative and settled judicial construction placed on that statute.

This is especially true where as in the case of the IDRA, there is other evidence outside the statute which indicates that this was the legislative intent. The applicable legislative history in the case of the IDRA could not be clearer that the Senate Committee specifically referred to the existing practice in the District of Columbia with regard to the instruction in question and approved the practice.

With regard to the instruction in question, all available evidence makes it clear that Congress intended to incorporate the practice under § 24-310 into the IDRA.

ARGUMENT

This case turns on the interpretation and application of the Insanity Defense Reform Act of 1984 ("IDRA").⁴ At trial the Petitioner asserted a defense of Not Guilty Solely by Reason of Insanity as provided for by 18 U.S.C. § 17. At the close of the evidence, by asking for and then obtaining from the Court the grant of Instruction G-14 (J.A. 9), the Government conceded that the Petitioner was entitled to present the defense of insanity to the jury. In connection with that defense Petitioner asserted a right to have the jury instructed that should the jury return an NGI verdict, he would be committed to a mental institution until such time as he no longer posed a danger to others or their property. (J.A. 22). The court refused to so instruct, and the case was submitted to the jury. During deliberations, the jury sent back a note stating,

⁴ Pub. L. No. 98-473, 98 Stat. 2057 (Codified at 18 U.S.C. §§ 17, 4241-4247 (1988) (attached to this Brief as Appendix A).

"We want you to explain the reason of insanity." (J.A. 9). The court simply reiterated its previously granted instruction on insanity. (J.A. 10). Petitioner was later convicted. The Fifth Circuit affirmed the conviction. (J.A. 29).

I. PRE-IDRA LAW IN THE CIRCUITS OTHER THAN THE D.C. CIRCUIT⁵

Before passage of the IDRA, the defense of insanity was a matter of federal common law except in the District of Columbia. There was no provision for a special verdict of not guilty by reason of insanity ("NGI") and no provision for any continuing federal jurisdiction over a defendant acquitted on the ground of insanity. *United States v. Borum*, 464 F.2d 896 (10th Cir. 1972). In the event of acquittal because of insanity, the only recourse for the government was to persuade the appropriate authorities of the State jurisdiction to institute commitment proceedings. *United States v. McCracken*, 488 F.2d 406 (5th Cir. 1974).

The burden of proof on the issue of sanity was on the government. If the defendant was able to present sufficient evidence to raise the question of insanity, the government was required to prove the defendant's sanity beyond a reasonable doubt. The prevailing view in all the Circuits, including the D.C. Circuit, on the test for insanity was the ALI test which provided that a defendant was entitled to acquittal if because of a substantial mental disease or defect he was unable to appreciate the wrongfulness of his acts or was unable to conform his conduct to the requirements of the law. *United States v. Brawner*, 471 F.2d 969, 971 (D.C. Cir. 1972).

⁵ Note, "Federal Jury Instructions and the Consequences of a Successful Insanity Defense," 93 Colum. L. Rev. 1223 (1993) contains a concise overview of both the pre-IDRA and post-IDRA law.

II. THE LAW IN THE DISTRICT OF COLUMBIA

The law in the District of Columbia on the defense of insanity pre-IDRA was considerably different than that in the other Circuits. Congress had adopted a statute which established the NGI verdict and provided for commitment of the defendant in the event of acquittal on the ground of insanity. *See*, D.C. Code § 24-301 (1989).⁶

That statute was authoritatively construed in *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958). In *Lyles* the court held, *inter alia*, that on the issue of insanity a defendant was entitled to have the jury instructed, if he so requested, that in the event of a verdict of not guilty by reason of insanity he would be committed to a mental institution until such time as he was no longer a danger to the public. The court specifically pretermitted any decision on the form that instruction should take. 254 F.2d at 728.

In *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), the court explained the *Lyles* decision and *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968), in light of amendments to D.C. Code § 24-301 subsequent to *Lyles*. The court suggested the following form of instruction as appropriate to effectuate the rule in *Lyles*:

If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

471 F.2d at 997-98.

⁶ The present form of the statute is Appendix B to this Brief.

Brawner also noted that by an amendment to D.C. Code § 24-301 in 1970, the burden of proof to establish the defense was shifted to the defendant. 471 F.2d at 998, n. 51.

After *Brawner*, the pertinent law on the insanity defense in the District of Columbia might be summarized as follows: 1) The defense of not guilty solely by reason of insanity was statutorily recognized; 2) the jury determined the validity of the defense in accord with the ALI test; 3) the burden of proof was on the defendant to establish the defense by a preponderance of the evidence; 4) at the option of the defendant, he could have the jury instructed in accordance with the form of instruction set forth in *Brawner*; and 5) if successful, the defendant was committed to a mental institution until such time as he could judicially establish that he no longer posed a danger to himself or others.⁷

III. PASSAGE OF THE IDRA

With the federal law of insanity in the state set forth above, the Congress enacted IDRA. In doing so, it selected as its model D.C. Code § 24-301. *United States v. Crutchfield*, 893 F.2d 376, 378 (D.C. Cir. 1990).

IDRA provided for a special verdict of not guilty solely by reason of insanity; 2) it abandoned the ALI standard and returned to the M'Naughton rule; 3) the burden of proof was placed on the defendant to establish the defense by clear and convincing evidence; and 4) if successful, the defendant was committed to a mental institution until such time as he could judicially establish that he no longer posed a danger to others or the property of others. *See, Appendix A.*

⁷ If certified sane and harmless by the superintendent of the institution where confined following acquittal, the defendant could be released without a hearing, but only if neither the court nor the government called for a hearing within 15 days of the filing of the superintendent's certificate. D.C. Code § 24-301(e).

While the IDRA adopted certain substantive changes which made the insanity defense more difficult to successfully assert, (i.e., increasing the burden of proof from a preponderance of the evidence to clear and convincing evidence and abandoning the ALI standard), the IDRA as adopted closely followed the statutory scheme and language of D.C. Code § 24-301. This is especially true for the procedural scheme by which the defense is asserted and successful defendants dealt with following their acquittal solely on the ground of insanity.

In contrasting the state of the law in the District of Columbia to that in the other circuits, the legislative history on the IDRA specifically cites the instruction approved in *Brawner* as an appropriate practice:

"The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. (footnote omitted). If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not." (footnote omitted).⁸

IV. THE DECISION OF THE FIFTH CIRCUIT IN SHANNON v. UNITED STATES⁹ AND THE POSITIONS OF THE OTHER CIRCUITS ON THE ISSUE

In affirming Petitioner's conviction, the Fifth Circuit relied primarily on the general principle that juries have no sentencing or punishment function and that Congress expressed no intent in the IDRA to alter that general principle. The court emphasized the following decisions in supporting its decision: *Rogers v. United States*, 422

⁸ Appendix C contains the quoted excerpt plus additional material, including the footnotes in the Report which cite directly to the *Brawner* decision and D.C. Pattern Instruction 5.11 which is on point.

⁹ 981 F.2d 759 (5th Cir. 1993), cert. granted November 1, 1993, No. 92-8346, — U.S. — (1993).

U.S. 35, 95 S. Ct. 2091, 45 L.Ed.2d 1 (1975), *United States v. Frank*, 956 F.2d 872 (9th Cir. 1992), cert. denied 113 S. Ct. 363 (1992) (Stevens, J. writing opinion respecting the denial of cert.), and *United States v. McCracken*, 488 F.2d 406 (5th Cir. 1974). The court concluded its opinion as follows:

"We adhere to our established precedents since there is no statutory directive that opens up to juries a role in the assessment or determination of penalties. We properly are concerned about possible unfortunate consequences of any alteration of the traditional role of the jury. We are convinced that a carefully limited and precise statutory mandate must be required. There is none here."

981 F.2d at 765.

The *Rogers* case only holds that under the statute there at issue the jury had no sentencing function. It does not hold that Congress cannot and has never provided such a role for the jury. For example, in federal capital cases Congress provided that the jury would be directly involved in the punishment decision. 18 U.S.C. § 1111. That part of the statute has been declared unconstitutional but not because Congress could not constitutionally authorize a jury to participate in the sentencing process. The statute has so far not been amended by Congress and remains under constitutional infirmity. *United States v. Goseyun*, 789 F.2d 1386 (9th Cir. 1986). However, it is submitted that no authority suggests that Congress is constitutionally forbidden to grant the jury a role in sentencing if it elects to do so. See, C. Murphy, "Integrating the Constitutional Authority of Civil and Criminal Juries," 61 Geo. Wash. L. Rev. 723, 781 *et seq.* (1993). By the same token, if Congress intended for juries to be instructed regarding the disposition of accused persons following an NGI verdict, it could certainly do so.

But what is more to the point, allowing the jury to know what will happen to the defendant in the event of

an insanity verdict does not give the jury any role in sentencing or punishment. It simply gives them the same information about the insanity verdict that they already possess from common knowledge about the verdicts of guilty and not guilty. *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958); *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992) (J. Newman concurring).

McCracken, which was cited by the Fifth Circuit in its opinion in this case, is authority for both sides of the argument. *McCracken* praises the reasoning in *Lyles*, while excoriating Congress for not providing a commitment procedure similar to that then found in the District of Columbia. It especially approves of the argument that if juries are not informed of the mandatory commitment of a defendant acquitted because of insanity, many juries will simply convict the defendant out of fear that their NGI verdict would endanger their fellow citizens by the defendant's immediate return to the public.

Shannon establishes that in the Fifth Circuit, IDRA did not work any change whatever in the law regarding the propriety of such an instruction, and absent unusual circumstances such as were present in *McCracken*, the trial court is not permitted to grant such an instruction.

The position of the Ninth Circuit is expressed in *United States v. Frank*, 956 F.2d 872 (9th Cir. 1992), cert. denied 113 S. Ct. 363 (1992). It is essentially the same as that of the Fifth Circuit. In noting the legislative history quoted earlier in this brief, the court stated:

This statement does not have the force of law nor does it purport to interpret or explain ambiguous language in the statute regarding jury instructions. (citation omitted).

956 F.2d at 881.

The court in *Shannon* also relied on this language from *Frank* to dismiss the statutory construction argument of

the Petitioner. 981 F.2d at 763. This position on the proper interpretation of the statute at issue takes too narrow a view of the effect of the statutory history in this case. While in this case the statutory history, in and of itself, may not determine the meaning of the statute, when Congress uses a statute with a settled interpretation as a model for a subsequent Congressional enactment, it adopts not only the statute itself, but the settled judicial interpretation placed on that statute. *E.g., Capital Traction Co. v. Hof*, 174 U.S. 1, 36, 19 S. Ct. 580, 43 L.Ed. 873 (1899). As established above, the D.C. statute and practice were the model for IDRA, and the settled judicial construction placed on D.C. Code § 24-301 was incorporated into the IDRA when enacted. This argument will be developed more fully below.

The position of the Eleventh Circuit is expressed in *United States v. Thigpen*, 4 F.3d 1573 (11th Cir. 1993). It is also essentially the position of the Fifth Circuit. It relies on *McCracken* as controlling authority, with one additional element:

"[W]e direct district courts to specifically instruct juries not to consider the consequences of a not guilty by reason of insanity verdict when that defense is presented."

4 F.3d at 1578.

This instruction is based on the familiar presumption that juries follow the instructions of the court. While such a presumption is essential to the judicial process as followed in this country, it is not wise to extend it beyond its necessary limits. Human experience tells us that one of the quickest ways to arouse another's curiosity is to inform him that he need not be concerned with a particular matter. The myth of Pandora's Box well illustrates the effect of such injunctions.

An argument of long standing against the rule as expressed in *Shannon* is that in the absence of information,

many jurors will speculate on the disposition which will be made of the defendant should an NGI be returned. The rule in the Eleventh Circuit is especially prejudicial to defendants because it draws special attention to an issue on which the jury is kept in ignorance. Under such an instruction, some jurors will no doubt speculate that the reason for the court's injunction is that the defendant will walk free if acquitted on the ground of insanity, and the court is simply trying to conceal the fact.

The Second Circuit in *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992) reached a substantially different result than the previously discussed circuits. However, there was no majority opinion on the panel, and three separate opinions resulted. Both Judge Lumbard and Judge Newman agreed that the instruction was proper at least in some circumstances, but disagreed on whether it was a matter of the judge's discretion or the defendant's right. Both Judge Lumbard and Judge Newman were influenced by the legislative history and Judge Newman also by the reasoning in *United States v. Neavill*, 868 F.2d 1000 (8th Cir.), vacated upon grant of reh'g en banc, 877 F.2d 1394 (8th Cir.), appeal dismissed at defendant's request, 886 F.2d 220 (8th Cir. 1989) (en banc), discussed *infra* and *Lyles*. The court found no abuse of discretion in the trial court's refusal of the instruction, and the conviction was affirmed.

Judge Newman's concurring opinion summarized the position of the panel as follows:

On the most significant issue raised by this appeal —whether a jury should be instructed as to the consequences of a verdict of not guilty by reason of insanity—the panel is divided three ways. I believe the instruction should always be given unless the defendant prefers its omission. Judge Winter believes the instruction should normally not be given. Judge Lumbard believes that the decision whether to give the instruction should be left to the discretion of the

trial judge. We are in agreement, however, that the omission of the instruction in this case does not require reversal of the conviction. I share that conclusion because I am satisfied that the omission of the requested instruction was harmless error. Though the panel is unanimous in its disposition of this appeal, its division on the issue of giving the requested instruction, if left unresolved, leaves the law of this Circuit unclear." (footnote omitted).

967 F.2d at 50.

Two considerations primarily influenced Judge Newman's reasoning. First, the instruction could be communicated "quickly and clearly in a brief sentence, without burdening the jurors with the details of the commitment procedure," 967 F.2d at 52 and would minimize the likelihood of an unjust conviction by a jury seeking only to avoid the release of a potentially dangerous mental patient. Second, the legislative history indicated that Congress intended to adopt the practice of granting the instruction as followed in the District of Columbia Circuit, which was not discretionary but mandatory if the defendant requested it.

Judge Winter, who also concurred in the result, wrote that in his opinion the instruction should rarely be given, but agreed that in occasional cases it would be appropriate, for example where there was some suggestion in the record that the defendant might go free if acquitted because of insanity. He nevertheless agreed with Judge Newman that the Senate Report clearly stated that the instruction should be given and did not leave it to the discretion of the court. He simply felt that the statement in the committee report had no effect because, "the statute itself lacks any relevant provision." *But see, Capital Traction Co.* and other cases gathered *infra*.

The Third Circuit recently decided the case of *United States v. Fisher*, —— F.3d ——, 1993 U.S. App. Lexis

29048 (3d Cir. 1993). The court expressed its holding as follows:

"We agree that this type of instruction may be a useful antidote when the trial judge has some basis for concluding that the jury might otherwise be improperly influenced by a false belief concerning the consequences of an NGI verdict. At the same time, however, we believe that this antidote should be administered with care and on a case-by-case basis."

1993 U.S. App. Lexis 29048, 21.

Of the previously discussed decisions, the *Fisher* Court's holding is most like Judge Lumbard's opinion in *Blume*. The instruction is not prohibited, but the trial judge should exercise a guarded discretion in granting it.

In *United States v. Neavill*, 868 F.2d 1000 (8th Cir.), vacated upon grant of reh'g en banc, 877 F.2d 1394 (8th Cir.), appeal dismissed at defendant's request, 886 F.2d 220 (8th Cir. 1989) (en banc), a panel of the Eighth Circuit found that the IDRA permitted it to reexamine former precedent in that circuit and adopt the position that the jury should be instructed that the defendant would be committed in the event of an insanity finding. The *Neavill* court was persuaded that the legislative history mandated rejecting prior circuit authority and adopting the position of the D.C. Circuit as expressed in *Lyles*. 868 F.2d at 1004, n. 8. The panel decision was later vacated by operation of law when an *en banc* rehearing was granted, and the appeal was later dismissed by the defendant so the Eighth Circuit *en banc* never reconsidered *Neavill*. Nevertheless the opinion has had some influence, as is attested by its citation by Judge Newman in *Blume*.

In *United States v. Pryor*, 960 F.2d 1 (1st Cir. 1992), at the request of the defendant, the trial court granted an instruction on the possible disposition of the defendant in the event of an NGI verdict, but added to it, apparently

over the defendant's objection, that the confinement might only last 40 days. The opinion does not set forth the language of the instruction requested by the defense, nor the charge as actually given after amendment by the trial court. It is impossible to tell from the opinion what the court's position would have been had the trial court ruled that the defendant was not entitled to any instruction on the point.

V. BY ADOPTING D.C. CODE § 24-310 AS ITS MODEL AND FOLLOWING THAT MODEL AS CLOSELY AS IT DID, CONGRESS INCORPORATED THE AUTHORITATIVE CONSTRUCTION OF *LYLES AND BRAWNER* INTO IDRA

In *Cathcart v. Robinson*, 5 Pet. (30 U.S.) 263, 8 L.Ed. 120 (1831) Justice Marshall wrote the opinion for the Court. One of the issues involved an alleged fraudulent conveyance and the effect of the English decisions construing the Statute of 27 Elizabeth on that issue. The Court held as follows:

The statute of Elizabeth is in force in this district. The rule, which has been uniformly observed by this court in construing statutes, is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these states. By adopting them they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them."

30 U.S. at 280.

The Court then determined that at the time of the adoption of 27 Elizabeth, the English decisions held that

a strong but rebuttable presumption existed of fraud under the facts of the case under consideration. There being no circumstances to overcome the presumption, the Court decided that the presumption of fraud must prevail in accordance with the rule established by the English decisions.

In *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S. Ct. 580, 43 L.Ed. 873 (1899) this Court was seeking to discover the effect of a statute adopted by Congress on March 1, 1823, which broadened the jurisdiction of Justices of the Peace in the District of Columbia. In part the Act provided for a trial by jury before a Justice of the Peace. In such event, any party aggrieved could appeal to the Circuit Court and obtain another jury trial. The question was thus presented whether under the 7th Amendment, the procedure providing for the possibility of two jury trials in succession was unconstitutional as permitting a fact once determined by a jury to be re-examined other than as permitted by the common law.

The Court decided the question by first determining that the dual jury trial provision had come from a New York statute originally enacted in 1801. It then determined the authoritative construction placed on the statute by the New York courts prior to the adoption of the statute by the District of Columbia in 1823. The New York courts had held that the jury provided for by the Act were judges of both the facts and the law, and that the Justice of the Peace had no authority to arrest the judgment or order a new trial, but must immediately enter judgment on whatever verdict the jury rendered. The Court then stated:

"By a familiar canon of interpretation, heretofore applied by this court whenever congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by congress, that construction must

be deemed to have been adopted by congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state." (citations omitted).

174 U.S. at 36.

The Court then applied the rule of the New York decisions and held that such a jury was not a jury within the meaning of the 7th Amendment since no such jury was known to the common law. Consequently it was not a breach of the 7th Amendment under the procedures in question to provide for a second jury trial on appeal.

Commenting on the strength and nature of this principle in *Carolene Products Co. v. United States*, 323 U.S. 18, 65 S. Ct. 1, 89 L.Ed. 15 (1944), the Court made the following statement:

"It [the principle of incorporation of authoritative judicial construction] is a presumption of legislative intention, however, which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention. (citations omitted). 323 U.S. at 26. *Accord, Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed. 2d 1356 (1957), criticized on other grounds, *Griffin v. United States*, 502 U.S. —, 112 S. Ct. 466, 116 L.Ed.2d 371 (1991); cf., *Evans v. United States*, 504 U.S. —, 112 S. Ct. —, 119 L.E.2d 57 (1992).

The argument previously established that Congress employed D.C. Code § 24-310 as its model statute for the IDRA. The decisions construing § 24-310 were quite clear (i.e., *Lyles* and *Brawner*), and Congress was well aware of them.¹⁰ The Senate Report demonstrates that

¹⁰ In the excerpt from the Senate Report which is reproduced in Appendix C to this Brief, the Committee specifically cites *Brawner* in reference to the instruction in that case informing the jury of the consequences of an NGI verdict. In another footnote to Ap-

Congress was aware of the interpretation placed on D.C. Code § 24-310 by *Lyles* and *Brawner*, and is a prime example of the "other indicia of intention" referred to in *Carolene Products Co.*

IDRA is not ambiguous on the issue of the instruction in question; it is silent, just as is its model statute, D.C. Code § 24-310. There is nothing about the text of IDRA itself, divorced from the context in which it was drafted and enacted, which suggests either that the instruction at issue ought, or ought not, be given. The incorporation of the *Lyles* and *Brawner* holdings on instructing NGI juries into the IDRA in no way contradicts the language of the statute or is otherwise inconsistent with its intent and purpose.

The emphasis placed on the absence of a specific provision regarding the instruction in IDRA by some of the circuit court decisions, for example *Shannon*, is difficult to understand. In providing for the judicial procedure by which a particular right or remedy will be enforced, Congress does not ordinarily go so far as to prescribe for the courts specific forms of jury instructions. This is especially true in a case such as this where the statute Congress used as a model contained no such provision.

Congress is largely a body of lawyers and is presumed to know the law. *Albernaz v. United States*, 450 U.S. 333, 101 S. Ct. 1137, 67 L.Ed. 2d 275 (1981). That would include the judicial construction placed on D.C. Code § 24-310. This presumption is borne out by the specificity with which the Senate Committee endorsed the procedure followed in the District of Columbia regarding instructing juries on the consequences of NGI verdicts.

Under *Cathcart, Capital Traction Co., Carolene Products Co.*, and *Yates*, Congress incorporated into the

pendix C, the Committee quotes D.C. Circuit Pattern Jury Instruction 5.11 which is the form of instruction suggested by *Brawner*.

IDRA the authoritative holdings of *Lyles* and *Brawner* regarding instructing a jury on the consequences of an NGI verdict. This is supported not only by the interpretive presumptions explained above, but by all that can be gleaned from the statutory history on the subject.

To the extent that there is doubt about Congress' intention regarding the issue under discussion, which Petitioner suggests is minimal in view of the foregoing argument, by analogy to the rule of lenity, that doubt ought to be resolved in favor of the position which provides the accused with the more expansive procedural right. *cf.*, *Bifulco v. United States*, 447 U.S. 381, 100 S. Ct. 2247, 65 L.Ed.2d 205 (1980); *United States v. Denny-Shaffer*, 2 F.3d 999 (10th Cir. 1993).

VI. WHAT SPECIFIC RULE SHOULD THIS COURT ADOPT?

This case should be reversed and remanded for a new trial. This Court should further declare that the decisions in *Lyles* and *Brawner*, to the extent they deal with the issue presented in this case and do not conflict with the terms of IDRA, were incorporated with the adoption of IDRA, and a defendant asserting the NGI defense is entitled as a matter of right to an instruction, at his option, instructing the jury on the consequences of an NGI verdict.

In addition to the instruction from *Brawner* quoted at page 9, other forms of suggested instruction are attached as Appendices to this Brief.¹¹ In accordance with the doctrine that Congress adopts the settled judicial construction of a statute which it employs as a model, the instruction in *Brawner*, which is also the basis of D.C. Circuit Pattern Instruction 5.11 (3d Ed. 1978) and 5.10 (4th Ed. 1993)¹², should be the basis for the draft of

an appropriate instruction under IDRA. An instruction under the IDRA modeled on *Brawner* would read as follows:

If the defendant is found not guilty solely by reason of insanity, it becomes the duty of the court to commit him to an appropriate mental institution. There will be a hearing within 40 days to determine whether defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by clear and convincing evidence that he is not likely to injure other persons or the property of others due to mental illness.

Despite the fact that strict adherence to doctrine would enjoin the use of *Brawner* as the sole model, the position of Judge Newman in *Blume* has the virtue of simplicity of language and ease of use. An instruction such as contemplated by Judge Newman would entail only a slight departure from the form suggested by *Brawner* and might read as follows:

If the defendant is found not guilty solely by reason of insanity, it becomes the duty of the court to commit him to an appropriate mental institution until such time, if any, as the Court finds he is not likely to injure other persons or the property of others due to mental illness.

¹¹ See Appendix D, E, F, G, and H.

¹² Appendices D and E.

CONCLUSION

For the reasons stated, the Petitioner respectfully requests that the judgment be reversed and the matter remanded for a new trial.

Respectfully submitted,

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APPENDICES

APPENDIX A**Insanity Defense Reform Act of 1984****§ 17. Insanity defense**

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(Added Oct. 12, 1984, P.L. 98-473, Title II, Ch IV, § 402(a), 98 Stat. 2057; Nov. 10, 1986, P.L. 99-646, § 34(a), 100 Stat. 3599.)

§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and

consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2057.)

§ 4242. Determination of the existence of insanity at the time of the offense

(a) Motion for pretrial psychiatric or psychological examination.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules

of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 93-473, Title II, § 403(a), 98 Stat. 2059.)

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of present mental condition of acquitted person.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) Burden of proof.—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of

property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) Determination and disposition.—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(f) Discharge.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (e) determines that the person has recovered from his mental disease or defect to such an extent that his

release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(g) Revocation of conditional discharge.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (f) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(h) Limitations on furloughs.—An individual who is hospitalized under subsection (e) of this section after being found not guilty only by reason of insanity of an offense for which subsection (d) of this section creates a burden of proof of clear and convincing evidence, may leave temporarily the premises of the facility in which that individual is hospitalized only—

(1) with the approval of the committing court, upon notice to the attorney for the Government and such individual, and after opportunity for a hearing;

(2) in an emergency; or

(3) when accompanied by a Federal law enforcement officer (as defined in section 115 of this title).

(As amended Pub.L. 98-473, Title II, § 403(a), Oct. 12, 1984, 98 Stat. 2059; Pub.L. 100-690, Title VII, § 7043, Nov. 18, 1988, 102 Stat. 4400.)

§ 4244. Hospitalization of a convicted person suffering from mental disease or defect

(a) Motion to determine present mental condition of convicted defendant.—A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

(e) Discharge.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403 (a), 98 Stat. 2061.)

§ 4245. Hospitalization of an imprisoned person suffering from mental disease or defect

(a) Motion to determine present mental condition of imprisoned person.—If a person serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the Government, at the request of the director of the facility in which the person

is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the person. The court shall grant the motion if there is reasonable cause to believe that the person may presently be suffering from a mental disease or defect or the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the transfer of the person pending completion of procedures contained in this section.

(b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the person may be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) **Hearing.**—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) **Determination and disposition.**—If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General shall hospitalize the person for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier.

(e) **Discharge.**—When the director of the facility in which the person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the per-

son's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the person has not expired, the court shall order that the person be reimprisoned until the expiration of his sentence of imprisonment.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403 (a), 98 Stat. 2062.)

§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

(a) **Institution of proceeding.**—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, the court may

order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) Discharge.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regi-

men of medical, psychiatric, or psychological care or treatment.

The court any any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to state of certain other persons.—If the director of a facility in which a person is hospitalized pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon

receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, §403(a), 98 Stat. 2062; Nov. 29, 1990, Pub.L. 101-647, Title XXXV, § 3599D, 104 Stat. 4932.)

§ 4247. General provisions for chapter

(a) Definitions.—As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs; and

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

(b) Psychiatric or psychological examination.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner

shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) **Psychiatric or psychological reports.**—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

- (1) the person's history and present symptoms;
- (2) a description of the psychiatric, psychological, and medical tests that were employed and their results;
- (3) the examiner's findings; and
- (4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him men-

tally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) **Hearing.**—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) **Periodic report and information requirements.**—
(1) The director of the facility in which a person is hospitalized pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.—Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.—Regardless of whether the director of the facility in which a person is hospitalized has filed

a certificate pursuant to the provisions of subsection (e) of section 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.—

The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403 (a), 98 Stat. 2065; Nov. 18, 1988, Pub.L. 100-690, Title VII, §§ 7044, 7047(a), 102 Stat. 4400, 4401.)

APPENDIX B**D.C. Code § 24-301****§ 24-301. Commitment during trial; restoration to competency; acquittal by reason of insanity; release after confinement; expenses of confinement; inconsistent statutes superseded; escaped persons; insanity defense; motions for relief.**

(a) If it appears to a court having jurisdiction of: (1) A person arrested or indicted for, or charged by information with, an offense; or (2) a child subject to a transfer motion in the Family Division of the Superior Court of the District of Columbia pursuant to § 16-2307, that, from the court's own observations or from *prima facie* evidence submitted to it and prior to the imposition of sentence, the expiration of any period of probation, or the hearing on the transfer motion, as the case may be, such person or child (hereafter in this subsection and subsection (b) of this section referred to as the "accused") is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the government objects, in which event the court, after hearing without a

jury, shall make a judicial determination of the competency of the accused to stand trial or to participate in transfer proceedings. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial or to participate in transfer proceedings, the court shall order the accused confined to a hospital for the mentally ill.

(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial or to participate in transfer proceedings, unless the accused or the government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial or to participate in transfer proceedings.

(c) When any person tried upon an indictment or information for an offense, or tried in the Family Division of the Superior Court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

(d)(1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e) of this section.

(2)(A) A person confined pursuant to paragraph (1) of this subsection shall have a hearing, unless waived, within 50 days of his confinement to determine whether

he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel:

(i) In the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or

(ii) In the case of a person who is not eligible to have counsel appointed by the court, by assuring representation by retained counsel.

(B) If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within 10 days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(3) An appeal may be taken from an order entered upon paragraph (2) of this subsection to the court having jurisdiction to review final judgments of the court entering the order.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies:

(1) That such person has recovered his sanity; (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others; and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of

the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of 15 days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of 1 or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) of this section is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of 15 days from the time such certificate is filed and served pursuant to this section: Provided, that the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

(f) When an accused person shall be acquitted solely on the ground of insanity and ordered confined in a hospital for the mentally ill, such person and his estate shall be charged with the expense of his support in such hospital.

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

(h) The provisions of this section shall supersede in the District of Columbia the provisions of any federal statutes or parts thereof inconsistent with this section.

(i) When a person has been ordered confined in a hospital for the mentally ill pursuant to this section and has escaped from such hospital, the court which ordered confinement shall, upon request of the government, order the return of the escaped person to such hospital. The return order shall be effective throughout the United States. Any federal judicial officer within whose jurisdiction the escaped person shall be found shall, upon receipt of the return order issued by the committing court, cause such person to be apprehended and delivered up for return to such hospital.

(j) Insanity shall not be a defense in any criminal proceeding in the United States District Court for the District of Columbia or in the Superior Court of the District of Columbia, unless the accused or his attorney in such proceeding, at the time the accused enters his plea of not guilty or within 15 days thereafter or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of his intention to rely on such defense. No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.

(k)(1) A person in custody or conditionally released from custody, pursuant to the provisions of this section, claiming the right to be released from custody, the right to any change in the conditions of his release, or other relief concerning his custody, may move the court having jurisdiction to order his release, to release him from custody, to change the conditions of his release, or to grant other relief.

(2) A motion for relief may be made at any time after a hearing has been held or waived pursuant to subsection (d)(2) of this section.

(3) Unless the motion and the files and records of the case conclusively show that the person is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. On all issues raised by his motion, the person shall have the burden of proof. If the court finds by a preponderance of the evidence that the person is entitled to his release from custody, either conditional or unconditional, a change in the conditions of his release, or other relief, the court shall enter such order as may appear appropriate.

(4) A court may entertain and determine the motion without requiring the production of the persons at the hearing.

(5) A court shall not be required to entertain a 2nd or successive motion for relief under this section more often than once every 6 months. A court for good cause shown may in its discretion entertain such a motion more often than once every 6 months.

(6) An appeal may be taken from an order entered under this section to the court having jurisdiction to review final judgments of the court entering the order.

(7) An application for habeas corpus on behalf of a person who is authorized to apply for relief by motion

pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court having jurisdiction to entertain a motion pursuant to this section, unless it also appears that the remedy by motion is inadequate or ineffective to test the validity of his detention. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 927; Apr. 14, 1906, 34 Stat. 113, ch. 1624; July 2, 1945, 59 Stat. 311, ch. 217; Aug. 9, 1955, 69 Stat. 609, ch. 673, § 1; Dec. 27, 1967, 81 Stat. 735, Pub. L. 90-226, title II, § 201; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, §§ 155(a), 159(e), title II, § 207; 1973 Ed., § 24-301.)

APPENDIX C

**Senate Report No. 98-225, 98th Cong.,
1st Session 240 (1983), reprinted 1984
U.S. Code Cong. & Adm. News 3182, 3406, 3422**

[page 224]

* * * *

After numerous appellate opinions, refining, clarifying, expanding, and limiting *Durham* over a period of eighteen years, the District of Columbia circuit overruled it in *United States v. Brawner*.⁸

Meanwhile, the other Federal courts of appeals, with some modifications and hesitations, had moved from *M'Naghten* and its volitional modification to the proposal of the American Law Institute's Model Penal Code, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of law."⁹ Adoption of the A.L.I. formulation marks the fourth and latest stage of development of Federal decisional law on the subject, although minor differences among the circuits continue to exist.¹⁰ In the *Brawner* case, *supra*, the District of Columbia joined the other circuits in embracing this approach.

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⁸ 471 F.2d 969 (D.C. Cir. 1972). See generally *Symposium on United States v. Brawner*, 1973 Wash. U.L.Q. 17-54.

⁹ Model Penal Code, § 4.01 (P.O.D. 1962).

¹⁰ The positions of the various circuits are surveyed in *United States v. Brawner*, *supra* note 8 at 979-981. The most notable departure from uniformity is the Third Circuit, where the court eliminated the cognitive aspect of the A.L.I. test. See *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); cf. *Government of Virgin Islands v. Bellott*, 495 F.2d 1393 (3d Cir. 1974).

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* * * *

As heretofore stated, the Federal law generally contains no provision for a verdict of not guilty by reason of insanity.⁶⁷ To cure the problems that this lack creates, section 4242(b) provides that where the issue of insanity is raised, the jury is to be instructed to find, or, in the event of a non-jury trial, the court is to find, the defendant (1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity.

The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity.⁶⁸ If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.⁶⁹

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⁶⁷ It should be noted that the District of Columbia Code, section 24-301(c), provides that the jury must state in its verdict if acquittal was solely on the grounds that the defendant was insane at the time of the commission of the offense. See also Criminal Jury Instructions for the District of Columbia, Instructions 5.07 and 5.11 (1972).

⁶⁸ See also *United States v. McCracken*, *supra* note 59 at 418-421. Compare Instruction 5.11 of the Criminal Jury Instructions for the District of Columbia (1972), which states: "If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness."

⁶⁹ *United States v. Brawner*, *supra* note 8. [Note 8 is found on the previous page of this Appendix.]

APPENDIX D

D.C. Circuit Pattern Jury Instruction
5.07 & 5.11 (3rd Ed. 1978)

Instruction 5.07

INSANITY

Alternative A:

The defendant in this case asserts the defense of insanity.

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense. One of these elements is the requirement [of premeditation and deliberation for first degree murder] [of specific intent for _____], on which you have already been instructed. In determining whether that requirement has been proved beyond a reasonable doubt you may consider the testimony as to the defendant's abnormal mental condition.

If you find that the Government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty, and you should not consider any possible verdict relating to insanity.

If you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider whether to bring in a verdict of not guilty by reason of insanity.

The law provides that a jury bring in a verdict of not guilty by reason of insanity if, at the time of the criminal conduct, the defendant, as a result of mental disease or defect, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that presumption no longer controls when evidence is introduced that he may have a mental disease or defect.

The term insanity does not require a showing that the defendant was disoriented as to time or place.

Mental disease [or defect] includes any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease [or defect] at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.

[The term "mental disease" differs from "mental defect" in that the former is a condition which is either capable of improving or deteriorating, while the latter is a condition not capable of improving or deteriorating.]

(Burden of proof—alternative versions:)

(a) [The burden of proof is on the defendant to establish by a preponderance of the evidence that, as a result of mental disease or defect, he either lacked substantial capacity to improve or deteriorate, while the latter is a condition not capable of improving or deteriorating, or lacked substantial capacity to appreciate the wrongfulness of his conduct. If the defendant has met that burden you shall bring in a verdict of not guilty by reason of insanity. If he has not met that burden you shall bring in a verdict of guilty of the offenses you found proved beyond a reasonable doubt.]

(b) [The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty by reason of insanity.]

Alternative B:

The defendant in this case asserts the defense of insanity.

If you find that the Government has proved beyond a reasonable doubt each essential element of the offense, you must then consider the evidence as to the defendant's insanity. If you find that the Government has failed to prove beyond a reasonable doubt each essential element of the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity.

The law provides that a defendant is not criminally responsible if, at the time of his criminal conduct, and as a result of mental disease or defect, he either lacks substantial capacity to conform his conduct to the requirements of the law, or lacks substantial capacity to recognize the wrongfulness of his conduct.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that presumption no longer controls when the defendant establishes by a preponderance of the evidence that he has a mental disease or defect.

Mental disease [or defect] includes any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs behavior controls. An abnormality

which is manifested only by a defendant's repeated criminal or otherwise anti-social conduct is not a mental disease or defect as the court has defined it to you.

The term "behavior controls" refers to the process and capacity of a person to regulate and control his conduct and his actions. In considering whether the defendant had a mental disease [or defect] at the time of the unlawful conduct with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls. [The term "mental disease" differs from "mental defect" in that the former is a condition which is either capable of improving or deteriorating, while the latter is a condition not capable of improving or deteriorating.]

The fact that the defendant had a mental disease [or defect] at the time of the unlawful act would not alone be sufficient to relieve him of the responsibility for the crime. There must be a causal relationship between the disease [or defect] and the unlawful act. The relationship between the disease [or defect] and the act must be substantial in its effect with respect to the act. That is, the disease [or defect] must have had a significant impact on the doing or not doing of the act.

The court emphasizes that regardless of the nature and extent of the experts' testimony in the case, the issue of whether the defendant is criminally responsible remains at all times a question to be resolved by the jury and not by the experts. It is for you alone to determine the existence, if any, of a mental disease or defect in the defendant, whether such a disability resulted in a substantial impairment of the defendant's capacity to obey the law, and whether, therefore, there existed a sufficient relationship between the mental abnormality and the criminal conduct with which the defendant was charged to warrant a conclusion that he should not be held responsible for his acts.

You must therefore first determine whether the Government has established beyond a reasonable doubt that the defendant committed the acts constituting the alleged offenses. If the government has failed to prove beyond a reasonable doubt any element of the offense[s] alleged in the indictment, then you must find the defendant not guilty, and you may not consider the defense of insanity. However, if you find beyond a reasonable doubt that the defendant has committed each element of the offense[s] charged in the indictment, then you must go on to determine whether the defendant is not guilty by reason of insanity.

In order to find that the defendant is not guilty by reason of insanity, you must be satisfied that he has established by a preponderance of the evidence that, as a result of a mental disease or defect, he either lacks substantial capacity to conform his conduct to the requirements of the law, or lacks substantial capacity to recognize the wrongfulness of his conduct. If the defendant has met that burden, you must find him not guilty by reason of insanity. On the other hand, if he has not met that burden, it is your duty to find the defendant guilty of those offenses you have found proved beyond a reasonable doubt.

By a preponderance of the evidence is meant such evidence as, when weighed against that opposed to it, has the more convincing force. To establish by a preponderance of the evidence is to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has the more convincing force and produces in your mind a belief that what is sought to be proved is more likely true than not true. If, however, you believe that the evidence on the issue of insanity is evenly balanced, then your findings on that issue must be against the defendant.

The defendant is not required to prove his insanity beyond a reasonable doubt. The defendant has succeeded

in carrying the burden of proof by a preponderance on the issue of insanity if, after consideration of all the evidence in the case, the evidence favoring his side of the issue is more convincing to you, and causes you to believe that on that issue the possibility of truth favors him.

Comment: As in the 1972 Edition, the Committee has published two alternative instructions on insanity. *Alternative A* remains unchanged from the 1972 Edition and conforms with the "suggestion for instruction on insanity" published as an appendix to the opinion of the United States Court of Appeals in *United States v. Brawner*, 153 U.S. App. D.C. 1, 471 F.2d 969 (1972) (*en banc*).

* * * *

Instruction 5.11

**EFFECT OF A FINDING OF NOT GUILTY
BY REASON OF INSANITY**

If the defendant is found not guilty by reason of insanity it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

APPENDIX E

**D.C. Circuit Pattern Jury Instruction
5.07 & 5.10 (4th Ed. 1993)**

Instruction 5.07

INSANITY*Alternative A:*

The defendant asserts the defense of insanity. If you find that the government has failed to prove beyond a reasonable doubt each essential element of the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity. If you find that the government has proved beyond a reasonable doubt each essential element of the offense, you must then consider the evidence as to the defendant's insanity.

A defendant is not guilty by reason of insanity if, at the time of his/her criminal conduct, and as a result of mental disease [or defect], s/he either lacked substantial capacity to conform his/her conduct to the requirements of the law, or lacked substantial capacity to recognize the wrongfulness of his/her conduct.

Mental disease [or defect] includes any abnormal condition of the mind, regardless of its medical label, which affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to a person's ability to regulate and control his/her conduct. [The term "mental disease" is a condition which is capable of either improving or deteriorating; the term "mental defect" is a condition not capable of improving or deteriorating.]

In considering whether the defendant had a mental disease [or defect] at the time of the alleged offense, you

may consider any evidence about the development, adaptation and functioning of the defendant's mental and emotional processes and behavior controls. The defendant need not show that s/he was disoriented as to time or place.

An abnormality manifested only by repeated criminal or otherwise anti-social conduct is not a mental disease or defect.

The defendant must prove not only that s/he had a mental disease [or defect], but also that there was a causal relation between the disease or defect and the unlawful act. That relationship must be substantial. In other words, the disease [or defect] must have had a significant impact on the defendant's committing the unlawful act.

Regardless of the nature and extent of the experts' testimony in the case, the issue of whether the defendant is criminally responsible remains at all times a question to be resolved by you, not by the experts. You, not the experts, decide whether the defendant had a mental disease [or defect]. You decide whether that disability substantially impaired his/her capacity to obey the law. And you therefore decide whether that disability was sufficiently related to the alleged criminal conduct for you to conclude that the defendant should not be held responsible for his/her unlawful act.

The defendant has the burden of proving that, as a result of mental disease or defect, s/he either lacked substantial capacity to conform his/her conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his/her conduct. The defendant is not required to prove this defense of insanity beyond a reasonable doubt. S/he is required to prove it by a preponderance of the evidence. This means that, after considering all of the evidence, you must decide whether you believe it is more likely than not that the defendant is not guilty by reason of insanity.

Consider all the evidence in evaluating the defense of insanity. If the defendant has met his/her burden of proof, you must find him/her not guilty by reason of insanity. If s/he has not met that burden, it is your duty to find the defendant guilty of those offenses you have found proven beyond a reasonable doubt.

Alternative B:

The defendant asserts the defense of insanity. If you find that the government has failed to prove beyond a reasonable doubt each essential element of the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity. If you find that the government has proved beyond a reasonable doubt each essential element of the offense, you must then consider the evidence as to the defendant's insanity.

A defendant is not guilty by reason of insanity if, as a result of a severe mental disease or defect, the defendant is unable, at the time of the criminal conduct, to appreciate either the nature and quality or the wrongfulness of his/her actions.

Mental disease [or defect] includes any severe abnormal condition of the mind, which substantially affects mental or emotional processes. [The term "mental disease" is a condition which is capable of either improving or deteriorating; the term "mental defect" is a condition not capable of improving or deteriorating.]

The defendant need not show that s/he was disoriented as to time or place.

An abnormality manifested only by repeated criminal or otherwise anti-social conduct is not a severe mental disease or defect.

The defendant must prove not only that s/he had a severe mental disease [or defect], but also that there was a causal relation between the disease or defect and the

unlawful act. That relationship must be substantial. In other words, the disease [or defect] must have had a significant impact on the defendant's committing the unlawful act.

Regardless of the nature and extent of the experts' testimony in the case, the issue of whether the defendant is criminally responsible remains at all times a question to be resolved by you, not by the experts. You, not the experts, decide whether the defendant had a severe mental disease [or defect]. [You decide whether that disability substantially impaired his/her capacity to obey the law.] And you therefore decide whether that disability was sufficiently related to the alleged criminal conduct for you to conclude that the defendant should not be held responsible for his/her unlawful act.

The defendant has the burden of proving that, as a result of a severe mental disease or defect, s/he was unable to appreciate the nature and quality or the wrongfulness of his/her conduct. The defendant is not required to prove this defense of insanity beyond a reasonable doubt. S/he is required to prove it by clear and convincing evidence. That is, the defendant must show it is highly probable that as a result of severe mental disease or defect s/he was unable to appreciate the nature and quality or the wrongfulness of his/her conduct.

Consider all the evidence in evaluating the defense of insanity. If the defendant has met his/her burden of proof, you must find him/her not guilty by reason of insanity. If s/he has not met that burden, it is your duty to find the defendant guilty of those offenses you have found proven beyond a reasonable doubt.

Instruction 5.10

[Instruction 5.11 in 1978 Edition]

EFFECT OF A FINDING OF NOT GUILTY BY REASON OF INSANITY

At alternative A (Superior Court):

If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant is entitled to release from custody. In that hearing, the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

At alternative B (District Court):

If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to a mental institution. There will be a hearing held within 40 days to determine whether the defendant is entitled to release from custody. In that hearing, the defendant will have the burden of proof. The defendant will remain in custody and will be entitled to release from custody if the court finds by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage to the property of another person due to a present mental disease or defect.

Comment: This instruction modifies Instruction 5.11 in the 1978 edition. Because of changes in federal law, it has been necessary to create Alternative A and Alternative B. Alternative A is to be used in cases tried in the D.C. Superior Court. It conforms with the provisions of D.C. Code § 24-301(d) which require the commitment of a defendant found not guilty by reason of insanity to

St. Elizabeths Hospital, a hearing within 50 days to determine suitability for release, and other provisions pertaining to the defendant's continued custody following an NGI verdict. Alternative B should be given in cases tried in the United States District Court. This is necessitated because of changes effected in 1984 in federal law regarding post-NGI commitments. *See 18 U.S.C. § 4243 (1984)*, providing for hospitalization of persons found not guilty by reason of insanity; *United States v. Neavill*, 868 F.2d 1000, 1004-05 (8th Cir. 1989).

* * * *

APPENDIX F**Sixth Circuit Pattern Instruction 6.04****SIXTH CIRCUIT PATTERN INSTRUCTION 6.04**

If you find the defendant not guilty because of insanity, then it will be my duty to send him to a suitable institution. He will only be released from custody if he proves by clear and convincing evidence that his release would not create a substantial risk that he might injure someone or seriously damage someone's property.

APPENDIX G

1 Federal Criminal Jury Instructions
(2nd Ed. 1991) No. 3.60B

3.60B

DISPOSITION; INFORMATION REGARDING
INSANITY ACQUITTAL

Your job is to decide whether the defendant is guilty, not guilty, or not guilty only by reason of insanity. [of each of the crimes charged]. If you decide that the defendant is guilty, my job is to decide what (his) (her) punishment will be. If you decide that (he) (she) is not guilty by reason of insanity, then within the next 40 days there will be a hearing to decide what happens to the defendant next. The defendant will be released only if (he) (she) proves that (his) (her) release will not create a substantial risk of bodily injury to another person or a substantial risk of serious property damage. If the defendant fails to prove that (his) (her) release will create no such risks then (he) (she) will be held in a treatment facility until a judge is satisfied that the defendant's release no longer creates such risks.

Whatever you decide—guilty, not guilty, or not guilty only by reason of insanity—you should make that decision on the evidence at this trial. You must not be influenced by what will happen to the defendant next.

APPENDIX H

Modern Federal Jury Instructions ¶ 8.09
Instruction 8-10

§ 8.09. Insanity

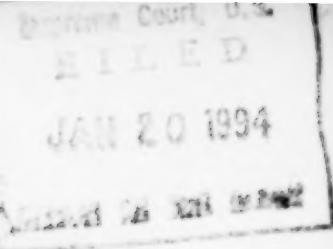
Instruction 8-10
Insanity

You have heard evidence tending to show that the defendant was insane at the time that the crime was committed. The government has offered evidence tending to show that he was sane. The burden of proof is on the defendant to prove by clear and convincing evidence that he was insane at the time of the offense.

Under the law, a defendant is not guilty if he was insane when the crime was committed. The law defines insanity to mean that a person is not responsible for criminal conduct if at the time of such conduct, as a result of a severe mental disease or defect, he was unable to appreciate the nature and quality or wrongfulness of his acts.

When I speak about a mental defect, I do not refer to any particular medical term. (By the same token, the mere fact that a person may repeatedly engage in criminal conduct does not, in and of itself, justify a finding that he is insane.) [Footnote omitted.]

(*Optional:* If you find the defendant not guilty because of insanity, then it will be my duty to send him to a suitable institution. He will remain in that institution until he proves in court that his release would not create a substantial risk that he might injure someone or seriously damage someone's property.)



In the Supreme Court of the United States

OCTOBER TERM, 1993

TERRY LEE SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's conviction should be reversed because the district court failed to instruct the jury on the consequences of returning a verdict of not guilty by reason of insanity.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NO. 92-8346

TERRY LEE SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. A29-A42) is reported at 981 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. The petition for a writ of certiorari was filed on April 12, 1993, and was granted on November 1, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Because he was qualified

as an armed career offender under 18 U.S.C. 924(e), petitioner was sentenced to 15 years' imprisonment, to be followed by a three-year period of supervised release. The court of appeals affirmed. J.A. A29-A42.

1. At about 4 a.m. on August 25, 1990, a police officer stopped petitioner on a street in Tupelo, Mississippi. The officer told petitioner that a detective wanted to speak with him and asked petitioner to accompany him to the police station. Petitioner stated that he did not want to live anymore, walked across the street, pulled out a pistol, and shot himself in the chest. Petitioner eventually recovered from the wound. J.A. A30.

Petitioner was charged with unlawful possession of a firearm. At trial, he raised an insanity defense. J.A. A30-A31. He asked the district court to give one of the following two instructions to the jury:

(1) "In the event it is your verdict that [petitioner] is not guilty only by reason of insanity, it is required that the Court commit [petitioner]," or

(2) "[Y]ou should know that it is required that the Court commit [petitioner] to a suitable hospital facility until such time as [petitioner] does not pose a substantial risk of bodily injury to another or serious danger to the property of another."

J.A. A32 n.3. Although the district court instructed the jury on the insanity defense, the court declined to give either of the proposed instructions on the effect of a verdict of not guilty by reason of insanity (NGI verdict). *Id.* at A32. Instead, the court instructed the jurors that it was their duty to base their verdict solely on the evidence, without prejudice or sympathy; that they should apply the law as explained by the court without regard to the consequences of the verdict; and that the question of punishment was for the court to

decide and should not enter the jury's consideration or discussion. J.A. A27-A28.

2. The court of appeals affirmed. J.A. A29-A42. The court noted "[t]he well-established general principle *** that a jury has no concern with the consequences of its verdict." *Id.* at A33, citing *Rogers v. United States*, 422 U.S. 35, 40 (1975). Relying on prior circuit precedent, the court held that the district court properly refused to instruct the jury on the effect of an NGI verdict. Such instructions, the court explained, "tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided." J.A. A35-A36, quoting *Pope v. United States*, 298 F.2d 507, 508 (5th Cir. 1962), cert. denied, 381 U.S. 941 (1965). Absent a statutory requirement that juries be granted a role in sentencing, the court held, "we adhere to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict." J.A. A39.

SUMMARY OF ARGUMENT

Under the Insanity Defense Reform Act of 1984 (IDRA), a defendant who is found not guilty by reason of insanity must be civilly committed until he can establish that his release would not create a substantial risk of bodily injury to others or serious damage to the property of others. Neither the IDRA nor principles of federal common law, however, require courts to instruct juries about the consequences of a verdict of not guilty by reason of insanity.

A. The IDRA provides for a verdict of not guilty by reason of insanity, but it contains no provision requiring that juries be instructed as to the consequences of such a verdict. Although the Senate Committee that reported the bill that became the IDRA endorsed the procedure followed in the

District of Columbia, where such an instruction was regularly given, that "endorsement" was not accompanied by any statutory provision or rule change that imposed a legal duty on courts to take such action. Nor is it fair to conclude that by enacting the IDRA, Congress intended to adopt the judicial construction of the D.C. Code provision that was one of the sources on which the IDRA was based. The IDRA was similar to a number of state insanity statutes as well, including some that had been construed *not* to require an instruction on the consequences of an NGI verdict. This is therefore not a case in which Congress adopted a statutory formulation from another jurisdiction and can be assumed to have adopted the judicial construction of the borrowed statute as well.

B. Nor is there any reason in the general principles of federal criminal practice to impose on district courts a blanket obligation to instruct juries on the consequences of an NGI verdict.

1. There is no empirical support for the assumption that jurors harbor the suspicion that defendants acquitted by reason of insanity will be immediately released into the community. There is therefore no need to instruct the jury in order to correct the jurors' assumed misapprehension on that point. Nor is there any reason to indulge a second assumption, also necessary to petitioner's argument, that jurors will be unable or unwilling to follow the court's instructions not to consider the effect of their verdict and to confine themselves to deciding the question of guilt based on the evidence in the record. It is a well-established principle of our system of jury trials that jurors are assumed to be able to follow the court's instructions, including instructions to decide questions of guilt without regard to the consequences of the verdict. It would be anomalous to hold that, in order to ensure that jurors will abide by that responsibility, they must first be instructed as to

the consequences of their verdict and then be directed to disregard, in deciding the case, what they have just been told.

2. An instruction about the consequences of an NGI verdict would be likely to distract the jury and add to the risk of a compromise verdict based on the jury's consideration of the consequences of its decision. An instruction regarding the consequences of the verdict would make it more likely that the jury would focus on that issue. If the jurors had doubts as to the defendant's guilt, but nonetheless considered him dangerous, the instruction could lead them to opt in favor of an NGI verdict, rather than an acquittal, in order to ensure that the defendant would not be released into the community. Or, if the jurors doubted that the defendant was insane but believed that the defendant nonetheless needed treatment, the instruction could lead them to decide in favor of an NGI verdict rather than a conviction. In either case, the instruction would have a distorting effect on the jury's deliberations.

3. In some circumstances, an instruction on the consequences of an NGI verdict may be appropriate. For example, if an attorney or witness has suggested that the defendant would be released upon an NGI verdict, or if there is some other indication in the record that the jury may be laboring under that impression, it would be proper for the court to instruct the jury in a way that corrects that misunderstanding. That is a matter, however, that should be left to the discretion of the district court in appropriate cases. It should not be addressed by this Court's creation of a blanket rule requiring that the jury be instructed on the consequences of an NGI verdict in every case.

4. Nothing in the record in this case called for the district court to instruct the jury as to the consequences of an NGI verdict. There was no suggestion from any attorney or wit-

ness that the defendant would be released if he were found not guilty by reason of insanity. And there was no indication in any question from the jury or otherwise that the jury labored under a misimpression as to the consequence of an NGI verdict that needed to be corrected in order to ensure that the jury's deliberations would not be skewed by improper considerations.

ARGUMENT

THE DISTRICT COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE EFFECT OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY

A. The Insanity Defense Reform Act Does Not Require A District Court To Instruct The Jury On The Effect Of A Verdict Of Not Guilty By Reason Of Insanity

Petitioner argues that the Insanity Defense Reform Act of 1984 (IDRA), Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2057 (codified at 18 U.S.C. 17, 4241-4247), requires district courts to instruct the jury on the effect of a verdict of not guilty by reason of insanity in every case in which an insanity defense is raised. There is no provision in the statute, however, that mandates an instruction to the jury on the consequences of an NGI verdict. Nor is there any other authority in any statute or rule that requires such an instruction. Moreover, the rule petitioner proposes is contrary to the settled principle that the jury's sole function is to determine the guilt or innocence of the defendant based on the evidence introduced at trial, and that the jury should not concern itself with the possible punishment or other consequences of its verdict. No court of appeals has interpreted the IDRA to require an instruction of the sort petitioner requested,¹ and this Court should not do so either.

¹ The courts have rejected arguments that an instruction regarding the consequences of an NGI verdict must be given in every case, although

1. Neither The IDRA Nor Its Legislative History Requires A District Court To Instruct The Jury Regarding The Consequences Of An NGI Verdict

Prior to the enactment of the IDRA, federal law did not provide for a verdict of not guilty by reason of insanity. Defendants who mounted a successful insanity defense were simply found "not guilty." See *Evalt v. United States*, 359 F.2d 534, 544-545 (9th Cir. 1966). Nor was there any federal provision for the confinement and treatment of defendants who were acquitted by reason of insanity. *Ibid.* Rather, the treatment such defendants received following an insanity acquittal depended on the willingness of state authorities to institute separate civil commitment proceedings. *United States v. Blume*, 967 F.2d 45, 51 (2d Cir. 1992) (Newman, J., concurring); *United States v. McCracken*, 488 F.2d 406, 416-417 (5th Cir. 1974); *United States v. Alvarez*, 519 F.2d 1036, 1048 (3d Cir. 1975); S. Rep. No. 225, 98th Cong., 1st Sess. 239, 241 (1983).

Before the IDRA was passed, the federal courts of appeals, with the exception of the District of Columbia Circuit, disapproved instructions to the jury concerning the disposition of a defendant acquitted by reason of insanity. See *United States v. Portis*, 542 F.2d 414, 420-421 (7th Cir. 1976);

they have recognized that giving such an instruction is within the district court's discretion in appropriate circumstances. See *United States v. Fisher*, No. 93-7002 (3d Cir. Nov. 10, 1993), petition for cert. pending, No. 93-7000 (filed Dec. 8, 1993); *United States v. Thigpen*, 4 F.3d 1573 (11th Cir. 1993) (en banc), petition for cert. pending, No. 93-6747 (filed Nov. 15, 1993); *United States v. Blume*, 967 F.2d 45, 49 (2d Cir. 1992); *United States v. Frank*, 956 F.2d 872, 878-882 (9th Cir. 1991), cert. denied, 113 S. Ct. 363 (1992). A panel of the Eighth Circuit held such an instruction required by the IDRA, but that opinion was vacated when the Eighth Circuit granted rehearing en banc, and the appeal was subsequently dismissed. *United States v. Neavill*, 868 F.2d 1000, 1002-1004 (8th Cir.), rehearing en banc granted, 877 F.2d 1394, appeal dismissed, 886 F.2d 220 (1989).

United States v. Alvarez, 519 F.2d at 1047-1048; *United States v. McCracken*, 488 F.2d at 422; *United States v. Borum*, 464 F.2d 896, 900-901 (10th Cir. 1972); *Pope v. United States*, 372 F.2d 710, 731 (8th Cir.) (en banc) (Blackmun, J., vacated on other grounds, 392 U.S. 651 (1967)); *Evalt v. United States*, 359 F.2d at 544-547. The courts' decisions rested on the principle that a jury should base its verdict solely on the evidence and should not give any consideration to the defendant's punishment or the consequences of the verdict. See *Rogers v. United States*, 422 U.S. at 40 (jury should be advised to reach its verdict without regard to the sentence to be imposed). Thus, courts did not advise the jurors of the consequences of an acquittal when that acquittal was based on a defense of insanity, and prosecutors were forbidden to argue to the jury that an acquittal would result in the defendant's release. See *Evalt v. United States*, 359 F.2d at 546.

In *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957) (en banc), cert. denied, 356 U.S. 961 (1958), the District of Columbia Circuit construed D.C. Code Ann. § 24-301 (1951), an insanity defense statute applicable only in the District of Columbia. That statute expressly authorized an NGI verdict and provided for the commitment of a defendant acquitted by reason of insanity. The court in *Lyles* held that a trial court must instruct a jury that an NGI verdict would result in the hospitalization of the defendant. The court concluded that because jurors knew from common knowledge the effect of a verdict of guilty or not guilty, they should similarly be advised of the effect of a verdict of not guilty by reason of insanity. 254 F.2d at 728.

When Congress enacted the IDRA in 1984, it made several changes in the federal insanity defense. First, it narrowed the defense by defining insanity as the lack of substantial capacity to appreciate the wrongfulness of one's act. 18 U.S.C.

17(a).² Second, the Act made insanity an affirmative defense by shifting the burden of proving insanity to the defendant. *Ibid.* Finally, the Act provided for a verdict of not guilty by reason of insanity and for the commitment of defendants receiving that verdict. See 18 U.S.C. 4242-4243.³

The 1984 Act contained no provision requiring district courts to instruct a jury on the effect of a verdict of not guilty by reason of insanity. Nonetheless, petitioner argues (Br. 11, 20-21) that the IDRA mandates that the requested instruction be given; in so doing, he does not rely on anything in the text of the statute, but points to a passage in the Senate report on the statute of which the IDRA was a part. The report states in pertinent part:

The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which

² The current federal definition of insanity is significantly narrower than that found in the American Law Institute's Model Penal Code, which defines insanity either as the lack of substantial capacity to appreciate the wrongfulness of one's act or the lack of substantial capacity to conform one's conduct to the requirements of the law. See Model Penal Code § 4.01 (1985).

³ A defendant found not guilty by reason of insanity is held in custody pending a civil commitment proceeding within 40 days of the verdict. 18 U.S.C. 4243(c). At the hearing, the defendant must establish that his release would not create a substantial risk of bodily injury to another or serious damage to the property of another due to a present mental disease or defect. 18 U.S.C. 4243(d). If the defendant fails to make that showing, he must be committed to the custody of the Attorney General so that appropriate arrangements can be made for his custody, care, and treatment. 18 U.S.C. 4243(e). When the director of the facility in which the defendant is hospitalized determines that he would no longer pose a substantial risk of bodily injury to another person or of serious damage to the property of another, he must file a certificate to that effect with the court. The court must then order the defendant discharged, or, on motion of the government, hold a hearing in order to determine whether the standard for release has been met. 18 U.S.C. 4243(f).

the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If the defendant requests that an instruction not be given, it is within the discretion of the court whether to give it or not.

S. Rep. No. 225, 98th Cong., 1st Sess. 240 (1983) (footnotes omitted).

The problem with petitioner's argument is that the committee's "endorsement" of the practice of instructing on the effect of a verdict of not guilty by reason of insanity was not incorporated into the statute. While a committee report may shed light on unclear statutory terms, legislators' remarks "cannot serve as an independent source having the force of law." *United States v. Frank*, 956 F.2d 872, 881-882 (9th Cir. 1991), cert. denied, 113 S. Ct. 363 (1992); see also *United States v. Blume*, 967 F.2d at 53 (Winter, J., concurring) ("a statement in a Committee report, however clear it may be, does not have the force of law where the statute itself lacks any relevant provision"); *United States v. Fisher*, No. 93-7002 (3d Cir. Nov. 10, 1993), slip op. 11 (quotations omitted) ("courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point"), petition for cert. pending, No. 93-7000 (filed Dec. 8, 1993).⁴

2. The IDRA Did Not Adopt The Judicial Interpretation Of The District Of Columbia Statute On The Insanity Defense

Petitioner also contends (Br. 11, 18-22) that Congress modeled the IDRA on D.C. Code Ann. § 24-301 (1981) and

⁴ In any event, the language used in the quoted passage is precatory, not mandatory, and it can be interpreted as endorsing a case-by-case determination whether to give such an instruction, rather than a rigid rule that such an instruction must be given in every case in which the defendant requests it.

intended to "adopt not only the statute itself, but the settled judicial interpretation placed on that statute." Accordingly, he argues that Congress adopted the D.C. Circuit's construction of D.C. Code Ann. § 24-301, in which the court directed that the jury be instructed on the consequences of an NGI verdict.

Petitioner relies on the principle of statutory construction that, where a legislature has "borrowed from [a] statute[]" that has received "a known and settled construction before [its] enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded." *Capital Traction Company v. Hof*, 174 U.S. 1, 36 (1899). See also *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944) ("[T]he general rule [is] that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording."); *Cathcart v. Robinson*, 30 U.S. (5 Pet.) 263, 279 (1831) (same); 2B N. Singer, *Sutherland Statutory Construction* § 52.02, at 198 (5th ed. 1992). A corollary of that principle, however, is that "[t]he strength of the presumption in favor of the foreign construction varies with the similarity between the foreign and domestic acts." *Id.* at 199. See also *Carolene Products Co.*, 323 U.S. at 26 (the presumption of legislative intention "varies in strength with the similarity of the language" and with "other indicia of intention"). Where the adoption is only of a "general scheme," the construction of the parent jurisdiction "is not considered controlling." 2B N. Singer, *supra*, § 52.02, at 199.

Congress did not "adopt" the District of Columbia's insanity defense statute when it enacted the IDRA. The IDRA was the product of extensive hearings and a legislative compromise between abolition of the insanity defense and retention of the defense in its then-current form. See S. Rep. No. 225, 98th Cong., 1st Sess. 222-224 (1983). To be sure, Con-

gress was aware of the previously enacted D.C. Code provisions governing NGI verdicts and commitment. See S. Rep. No. 225, *supra*, at 240 n.67, 241 & nn.73 & 76. But Congress departed in a number of significant ways from the District of Columbia's statutory scheme. For example, the IDRA requires the defendant to prove insanity by clear and convincing evidence (18 U.S.C. 17), whereas the District of Columbia statute requires only that the defendant establish insanity by a preponderance of the evidence. D.C. Code Ann. § 24-301(j) (1981). Under the IDRA, a defendant seeking to secure his release following a verdict of not guilty by reason of insanity must establish his right to release by clear and convincing evidence if his offense was a crime of violence (18 U.S.C. 4243(d)); under the District of Columbia provision, the defendant must make his case for release only by a preponderance of the evidence. D.C. Code Ann. § 24-301(k)(3) (1981). A federal defendant seeking to secure his release following commitment must establish only that he is not a danger to others or to property (18 U.S.C. 4243(d)); applicants for release in the District of Columbia must prove that they are not dangerous to themselves. D.C. Code Ann. § 24-301(e) (1981). In addition, Congress rejected the "volitional" and "cognitive" formulation of the test for insanity that had been adopted as the governing test under the D.C. Code provision. See *United States v. Brawner*, 471 F.2d 969, 973-995 (D.C. Cir. 1972). The IDRA defines insanity more narrowly as the lack of substantial capacity to appreciate the wrongfulness of one's act.

Thus, while the IDRA follows the structure of the D.C. Code insanity defense provision by creating three possible verdicts in insanity defense cases, Congress did not by any means simply borrow District of Columbia law for the federal system. Accordingly, the pedigree of the federal statute does not suggest that Congress meant to adopt the D.C. Circuit's decision in *Lyles* as federal law. In fact, because the federal

scheme bore some similarity to the statutory procedures in some States that had rejected the rule that an instruction concerning the consequences of an NGI verdict must always be given, it is no less plausible to conclude that Congress intended to incorporate those courts' construction of their statutes, rather than the D.C. Circuit's gloss on the D.C. Code provision in *Lyles*.⁵

⁵ By 1970, all but one State had adopted some form of statutory procedure allowing for the commitment of a defendant acquitted by reason of insanity, although the statutes varied considerably. See Note, *Criminal Procedure—Defendant's Right to Jury Instruction On Consequences of Verdict of Not Guilty By Reason of Insanity*, 16 Wayne L. Rev. 1197, 1198 n.4 (1970). Between 1970 and 1984, the state courts laid down a variety of rules concerning the propriety of instructing the jury on the consequences of an NGI verdict. See Comment, *The Not Guilty by Reason of Insanity Verdict: Should Juries be Informed of Its Consequences?*, 72 Ky. L.J. 207, 211-217 & nn.24-40 (1983-1984). Some courts concluded that the instruction must always be given, others ruled that it must be given at the defendant's request, others held that no instruction should be given except to correct a testimonial or prosecutorial misrepresentation, and a few ruled that the matter should be left to the trial judge's discretion. *Id.* at 211-212; Annotation, *Instructions in State Criminal Case in Which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 A.L.R. 4th 659, 659-697 (1990) (documenting division in authority). By the time the IDRA was enacted, most of the States either forbade the instruction or allowed it to be given in the trial judge's discretion. See *Government of the Virgin Islands v. Fredericks*, 578 F.2d 927, 934-935 & n.11 (3d Cir. 1978). The position in *Lyles* continues to represent the minority view. See J. Lui, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 Colum. L. Rev. 1223, 1236 n.29 (1993) (majority of the state courts hold that instruction should generally not be given).

B. District Courts Should Not Be Required To Instruct The Jury In Every Case As To The Consequences Of A Verdict Of Not Guilty By Reason Of Insanity

1. Jurors Can Be Expected To Follow Instructions Not To Consider the Consequences Of Their Verdict

Petitioner asserts (Br. 12-13) that a jury should always be informed of the consequences of an NGI verdict, because otherwise jurors are likely to speculate about the consequences of the verdict, and because they may believe that an NGI verdict will result in the release of a potentially dangerous individual.

As an initial matter, petitioner's argument assumes that, unless otherwise informed, jurors will believe that defendants acquitted by reason of insanity will routinely be released into the community. That assumption is unjustified. As the court observed in *United States v. Fisher*, slip op. 13 (citation omitted), "'it is not at all clear' that jurors are generally ignorant of the fact that [defendants acquitted by reason of insanity] may be civilly committed. On the contrary, highly publicized cases, such as that involving John Hinckley, have dramatized the possibility of civil commitment following [an NGI verdict].'" See also *United States v. Blume*, 967 F.2d at 54 (Winter, J., concurring) (there is no reason to assume that jurors hold the notion that defendants acquitted by reason of insanity are not confined).

The available evidence as to jurors' understanding of the consequences of a verdict of not guilty by reason of insanity fails to support petitioner's assumption that jurors believe that defendants who are found not guilty by reason of insanity will be released. Studies have shown that most jurors correctly assume that the defendant will be committed after an NGI verdict. See G. H. Morris et al., *Whither Thou Goest? An Inquiry into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 San Diego L. Rev. 1058,

1068 (1977) (survey of jurors who had participated in trials in which an insanity defense was raised); R. Simon, *The Jury and the Defense of Insanity* 94 (1967) (jurors on experimental juries who were not advised of the consequences of an insanity acquittal); B. Schwartz, *Should Juries be Informed of the Consequences of the Insanity Verdict?*, J. Psychiatry & Law 167, 173 & n.51 (Summer 1980) ("the overwhelming majority of jurors already know that the state does not release dangerous persons"); see also J. Lui, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 Colum. L. Rev. 1223, 1241 n.91, 1243 & n.101 (1993).⁶ There is therefore no reason to accept petitioner's assumption that, absent an instruction as to the consequences of an NGI verdict, juries will harbor the belief that an NGI verdict will result in the defendant's release.

Petitioner's argument that a jury must be instructed about the consequences of an NGI verdict requires the acceptance of a second assumption as well: that jurors who believe an NGI verdict will result in the immediate release of the defendant will be unable or unwilling to follow the court's instruction not to consider the effect of their verdict, and will succumb to the temptation to violate their oaths by basing their verdict on factors other than the evidence adduced at trial. There is no reason to believe that jurors will disregard their instructions in that way.

⁶ Neither petitioner nor his amicus cites any authority to the contrary. Although amicus Coalition for the Fundamental Rights of Ex-patients cites two articles in support of its assertion (Amicus Br. 8 & n.5) that "[m]embers of the public believe that insanity acquittees go free; that they 'beat the rap,'" those articles do not indicate anything about the beliefs of jurors, but simply note that insanity acquittees often spend at least as much time in commitment as they would have spent incarcerated if they had been convicted. See M. Pogrebin et al., *Not Guilty by Reason of Insanity: A Research Note*, 8 Int'l J. of Law and Psychiatry 237 (1986); J. H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L.J. 397, 402-404 (1983).

An established principle of our jury trial system is that, absent statutory provision to the contrary, the jury determines the defendant's guilt or innocence without regard to considerations of punishment or other consequences of the verdict. *Rogers v. United States, supra*; *United States v. Fisher*, slip op. 11; *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993) (en banc), petition for cert. pending, No. 93-6747; *United States v. Frank*, 956 F.2d at 879; *United States v. Parrish*, 925 F.2d 1293, 1299 (10th Cir. 1991); *United States v. Goodface*, 835 F.2d 1233, 1237 (8th Cir. 1987); *United States v. Greer*, 620 F.2d 1383, 1385 (10th Cir. 1980); *id.* at 1386 (Doyle, J. concurring); *Pope v. United States*, 372 F.2d at 731. Jurors are routinely admonished to base their verdict solely upon the facts, the law, and the judge's instructions. In fact, jurors are typically warned that they would violate their oaths if they considered the possible punishment or other consequences of the verdict. See *United States v. Fisher*, slip op. 11; *Rogers v. United States*, 422 U.S. at 40 (jury should have been admonished "that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed").⁷

Rules for instructing juries are based on the assumption that jurors will follow their instructions, not on the assumption that they will disregard them. That assumption incorporates the view that juries "do not consider and base their

⁷ See E. Devitt, C. Blackmar, M. Wolff & K. O'Malley, *Federal Jury Practice and Instructions* § 10.01 (4th ed. 1992) (instruction to the jury that "you are not to concern yourself in any way with the sentence which the defendant might receive"); I L. Sand, J. Siffert, W. Loughlin & S. Reiss, *Modern Federal Jury Instructions—Criminal* § 9.01 (1993). See also, e.g., Sixth Circuit Pattern Jury Instruction 8.05 (1991); *United States v. Frank*, 956 F.2d at 879; *United States v. Greer*, 620 F.2d at 1386 (Doyle, J., concurring); *United States v. Briscoe*, 574 F.2d 406, 408 (8th Cir.), cert. denied, 439 U.S. 858 (1978); *United States v. Davidson*, 367 F.2d 60, 63 (6th Cir. 1966).

decisions on legal questions with respect to which they are not charged." *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986). This Court has refused to engage in the "unfounded speculation that *** jurors disregarded clear instructions of the court in arriving at their verdict." *Opper v. United States*, 348 U.S. 84, 95 (1954). To do so would violate "[o]ur theory of trial," which "relies upon the ability of a jury to follow instructions." *Ibid.*

Applying this fundamental premise, the Court has held, for example, that a defendant's rights were not abridged by the admission, during the guilt phase of a trial, of a prior conviction that was admissible solely for sentencing purposes. See *Spencer v. Texas*, 385 U.S. 554 (1967). To say that limiting instructions are constitutionally inadequate to protect against the possible prejudicial effects of such evidence, the Court held, "would make inroads into th[e] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Id.* at 562. The Court refused to take such a step, holding that "the jury is expected to follow instructions in limiting this evidence to its proper function." *Ibid.*

The Court reaffirmed that view in *Marshall v. Lonberger*, 459 U.S. 422 (1983), where it upheld the admission, at the guilt phase of a capital case, of a prior conviction that was admissible only to show that the defendant deserved the death penalty. In so holding, the Court expressly noted that "the trial judge gave a careful and sound instruction requiring the jury to consider respondent's prior conviction only for [sentencing] purposes." 459 U.S. at 438-439 n.6.

The Court likewise adhered to the premise that jurors follow their instructions, when it rejected the "dubious" and "speculative assumption[]" that jurors would use a defendant's silence at trial against him, despite instructions not to do so, see *Lakeside v. Oregon*, 435 U.S. 333, 340

(1978);⁸ in refusing to find that a majority of the jurors would ignore an instruction to find guilt beyond a reasonable doubt simply because three of their number favored acquittal, see *Johnson v. Louisiana*, 406 U.S. 356, 360-361 (1972); and in refusing to assume that the jury “misunderstood or disobeyed” the instructions of the trial judge to consider the evidence against each defendant separately, see *United States v. Lane*, 474 U.S. 438, 450 n.13 (1986).

To be sure, in *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” 391 U.S. at 135. The Court in that case held that limiting instructions will not suffice “where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.” *Id.* at 135-136. The Court made clear, however, that *Bruton* was a narrow exception to the general assumption that juries can and will follow the court’s instructions. In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court emphasized the limited reach of *Bruton*, holding that the admission of a nontestifying co-defendant’s confession did not violate the defendant’s Confrontation Clause rights where the trial court instructed the jury not to consider the confession against the defendant and the confession was redacted to eliminate any reference to her. The Court assumed that the defendant would have been harmed by the co-defendant’s confession if the jury had disobeyed its instructions not to consider the confes-

⁸ The Court observed in *Lakeside* that “we have not yet attained that certitude about the human mind which would justify us in *** a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court.” 435 U.S. at 340 n.11, quoting *Bruno v. United States*, 308 U.S. 287, 294 (1939).

sion against the defendant, 481 U.S. at 208 n.3, but it found no reason to depart from the “almost invariable assumption of the law that jurors follow their instructions,” 481 U.S. at 206.

Where the insanity defense is at issue, there is no reason to cast aside the ordinary presumption that a jury will follow instructions to decide the case on the evidence and to refrain from considering the effect of the verdict. First of all, the task of disregarding the consequences of a verdict is not so inherently difficult as to overwhelm the average juror’s will or ability to follow instructions and abide by the juror’s oath. There are other circumstances in which it may require just as much effort for a juror to follow the court’s instructions, but in which our judicial system necessarily assumes that the juror will honor his oath to determine the defendant’s guilt or innocence based solely on the evidence. For example, if the government has failed to meet its burden of proof at trial, jurors are expected to return a verdict of not guilty, even if they are convinced that the defendant is dangerous and should be incarcerated.

Moreover, it is doubtful whether an instruction concerning the consequences of a verdict of not guilty by reason of insanity would allay the fears of those jurors willing to violate their oaths and convict a defendant, whom they believe to be not guilty by reason of insanity, solely in order to prevent his release. As the court observed in *United States v. Fisher*, slip op. 13: “[I]f the members of a jury are so fearful of a particular defendant’s release that they would violate their oaths by convicting him solely in order to ensure that he is not set free, it is questionable whether they would be reassured by anything short of an instruction strongly suggesting that the defendant, if found [not guilty by reason of insanity], would very likely be civilly committed for a lengthy period.” Yet an accurate instruction about the consequences of a such a verdict would not provide such assurance. Under

the IDRA, a defendant who has been found not guilty by reason of insanity is entitled to a release hearing within 40 days of the verdict, and may be released as soon as the hearing is completed. 18 U.S.C. 4243(a)-(e). “The only mandatory period of confinement, therefore, is the period between the verdict and the hearing, which may be held at any time within forty days.” *United States v. Fisher*, slip op. 14, quoting *United States v. Blume*, 967 F.2d at 54 (Winter, J., concurring). And while the defendant is entitled to be released only if he satisfies the court that his release would not create a substantial risk of bodily injury to another person or of serious damage to the property of another, a jury in an insanity case would have no way of predicting whether or when the defendant will be able to make such a showing. *United States v. Fisher*, slip op. 14. “Although the jury in such a case will presumably hear testimony concerning the defendant’s sanity at the time of the offense, it will not necessarily hear any testimony bearing on the separate question whether the defendant would pose a danger if released after the verdict.” *Ibid.*

Finally, it is anomalous to suggest that a district court must instruct the jury concerning facts that the court must then instruct the jury to disregard. In seeking an instruction as to the consequences of a verdict of not guilty by reason of insanity, the defendant asks, in effect, “that we assume that the jury will disregard its instructions to ignore the consequences of its verdict and then allow erroneous extraneous information to affect its judgment. The cure proposed is to give the jury the correct information, which it should then be instructed to ignore.” *Government of the Virgin Islands v. Fredericks*, 578 F.2d 927, 936 (3d Cir. 1978); see also *United States v. Del Toro*, 426 F.2d 181, 184 (5th Cir.) (“ordinarily there is no reason why the jury should be advised of something that has nothing to do with its duty”), cert. denied, 400 U.S. 829 (1970).

2. An Instruction On The Consequences Of An NGI Verdict Would Distract The Jury From Its Responsibility To Return A Verdict Based On The Evidence At Trial

A rule that juries must be informed of the consequences of an NGI verdict would also create the risk of distracting the jury from its task of reaching an accurate verdict. To inform the jury about the consequences of its verdict or the court’s sentencing powers “tend[s] to draw the attention of the jury away from their chief function as sole judges of the facts.” *Pope v. United States*, 298 F.2d 507, 508 (5th Cir. 1962); see also *United States v. Blume*, 967 F.2d at 54 (Winter, J., concurring) (“the giving of such an instruction invites juries to ponder matters that are not within their authority and creates a strong possibility of confusion”). Instructions that inform jurors of the consequences of an NGI verdict, whether or not the jurors are already aware of them, force the jury to focus on matters other than the evidence adduced at trial—matters that are irrelevant to the defendant’s guilt or innocence. See *United States v. Thigpen*, 4 F.3d at 1578 (the instruction “all but invites the jury to consider the likelihood and timing of [the defendant’s] release”); *United States v. Blume*, 967 F.2d at 54 (Winter, J., concurring) (instruction “all but directs [jurors] to consider the likelihood of a release date, a matter which * * * is none of their business”).

In addition, by “highlight[ing] precisely the sort of information—information about the consequences of a verdict—that the jury is not supposed to consider,” *United States v. Fisher*, slip op. 12, an instruction that calls the jury’s attention to the aftermath of the verdict may increase the likelihood of a compromise verdict.⁹ A juror who is uncertain

⁹ This Court recognized in *Rogers*, 422 U.S. at 40, that there is an increased risk of compromise when the jury’s attention is diverted away from the evidence and directed to the consequences of a verdict. There, the Court overturned a conviction on the ground that the district court

whether the defendant committed the charged offense might favor a verdict of not guilty by reason of insanity rather than a verdict of acquittal, on the theory that “[c]ommitting a possibly innocent person is at least not as harsh as imprisoning him; nor is committing a possibly guilty person as dangerous as freeing him.” B. Schwartz, *supra*, J. Psychiatry & Law, at 174; *Government of the Virgin Islands v. Fredericks*, 578 F.2d at 936. Another juror, who believed the defendant was guilty but needed psychiatric care, might be persuaded to accept an NGI verdict based on the conclusion that the defendant would be provided with treatment if he were civilly committed for a lengthy period. Or, a juror who believed the defendant committed the criminal act but was insane might be persuaded to join a verdict of guilty on the ground that the period of incarceration following a guilty verdict would not be that much more onerous than the period of civil commitment that would result from an NGI verdict. See *United States v. Fisher*, slip op. 12 n.7.

Petitioner argues (Br. 13) that juries generally understand the consequences of a verdict of guilty (the defendant will go to jail) and of a verdict of not guilty (the defendant will be released). Accordingly, he contends, juries should also be informed of the consequences of a verdict of not guilty by reason of insanity in order to provide them with the same information concerning the verdict that they already have about the options of “guilty” or “not guilty”. See *Lyles v. United States*, 254 F.2d at 728 (“[w]e think the jury has the

should not have responded affirmatively to the jury’s inquiry whether it could return a verdict of guilt with a recommendation of “extreme mercy.” The Court explained that the district court’s response “may have induced [a unanimous guilty verdict] by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise.” 422 U.S. at 40.

right to know the meaning of this possible verdict as accurately as it knows by common knowledge” that “a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose”).

That argument, however, falls with its premise: while juries may have an accurate understanding in the abstract of the consequences of verdicts of guilty and not guilty, those assumptions may be wrong in particular instances. For example, an acquittal will not result in the release of a defendant who is already serving a prison sentence on another charge. If the government in such a case fails in its burden of proof, the jury may nonetheless harbor very real concerns that the defendant is dangerous and should not be released. In that situation, no less than in the instant case, the jury may simply refuse to acquit despite the failure in the government’s proof if it believes an acquittal will result in the release of the defendant. Yet no one would suggest that the jury in such a case should be instructed that a verdict of not guilty would not result in the defendant’s release because he would remain incarcerated based on his conviction in another case.

Similarly, a jury may be mistaken about the length of time a defendant will serve in prison if he is convicted. The jury may believe, for example, that the offense of conviction carries a short sentence, when, in fact, the prescribed sentence is quite lengthy. Or the jury may be unaware that the offense carries a mandatory sentence that the judge may not reduce based on individual mitigating circumstances. The jury in such cases might be more inclined to convict based upon its mistaken assumption about the punishment that will attach. The possibility of such a mistaken assumption, however, has never been considered a sufficient reason to disturb the settled principle that jurors should not be instructed as to the defendant’s possible punishment. In short, the possibility that

the jury may be laboring under a misunderstanding about the penalty that the defendant may face does not warrant an instruction advising the jury about the consequences of its verdict. The result should be no different in cases in which the defendant raises a defense of not guilty by reason of insanity. See *United States v. Thigpen*, 4 F.3d at 1578 ("We decline to assume the task of distinguishing those dispositional consequences of which the jury should be advised."); *United States v. Frank*, 956 F.2d at 879 (citation omitted) (the rule against instructing the jury applies uniformly to all dispositional issues, including whether "the court may impose [a] minimum or maximum sentence, will or will not grant probation, [or] when a defendant will be eligible for parole").

Because it would be difficult to draw a principled distinction between an instruction concerning the aftermath of an NGI verdict and other instructions about punishment that might aid the defendant, the adoption of petitioner's mandatory rule in this case would open the door to demands from other defendants for analogous instructions in a variety of circumstances. Cf., e.g., M. Heumann and L. Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 Amer. Crim. L. Rev. 343 (1983) (arguing that juries should be informed of mandatory sentences so as to enhance the possibility of acquittal). The adoption of petitioner's position would therefore threaten the well-established rule that jurors are not to concern themselves with the consequences of their verdict, a principle that is at the core of the division of responsibility in our jury system between the jury and the judge.¹⁰

¹⁰ That principle, of course, does not apply in the same way when the jury is charged with responsibility for sentencing. Accordingly, this case is not likely to be controlled by the disposition of *Simmons v. South Carolina*, No. 92-9059 (argued Jan. 18, 1994), which involves the ques-

3. The District Court Should Retain Discretion To Advise The Jury Of The Consequences Of An NGI Verdict In Appropriate Circumstances

Because it is impossible to predict, as a general matter, whether providing information about the consequences of an NGI verdict will reduce the risk of verdicts based on compromise or on jurors' mistaken beliefs, this Court should not adopt an inflexible rule mandating such an instruction in every case. See, e.g., B. Schwartz, *supra*, J. Psychiatry & Law, at 175 (Whether "giving or withholding the instruction causes more prejudice" is a question that "admits of no final answer"). That is not to say, however, that there are no circumstances in which such an instruction would be warranted. Courts have acknowledged that the trial judge should consider an appropriate instruction where there is reason to believe that the jury may be influenced by improper considerations. For example, "if a witness or attorney intimates during trial that [an NGI verdict] would endanger the community" by resulting in the defendant's immediate release, see *United States v. Fisher*, slip op. 14-15, the judge might wish to give an instruction to correct the erroneous impression engendered by such a statement. See also *United States v. Thigpen*, 4 F.3d at 1578 ("If a witness or the prosecutor states or implies that the defendant would be released if found not guilty by reason of insanity, a curative instruction would be appropriate to insure that the jurors are not misled into an erroneous view of the consequences of such a verdict."); *United States v. Blume*, 967 F.2d at 54 (Winter, J., concurring) (discretion to give instruction as to consequences of a verdict should be "limited to cases in which the trial judge has reason to believe that a particular jury may think

tion whether a sentencing jury in a capital case should be advised of the sentence that would be imposed if the jury decided not to impose the death penalty.

that insanity acquittees usually go free and that there is some possibility of the jury's acting on that belief"); *Eovali v. United States*, 359 F.2d at 544-546 (reversing conviction where the prosecution was allowed to comment that an insanity acquittal would result in the defendant's release); see also *Dipert v. State*, 286 N.E.2d 405, 407 (Ind. 1972) (curative instruction appropriate "where an erroneous view of the law on this subject has been planted in [the jurors'] minds"); *State v. Huiett*, 246 S.E.2d 862, 864 (S.C. 1978) (permitting curative instruction if needed "to clarify a misstatement of the law"). Likewise, if the jurors' questions reflect concern about what is to become of the defendant, or an inaccurate understanding of the consequences of an NGI verdict, the judge may properly elect to provide the jury with some information on that subject.

Absent such unusual circumstances, the court ordinarily should not give such an instruction, because it is in tension with the general principle that the consequences of the verdict are not the jury's concern. In the end, however, the question whether the circumstances call for a curative instruction should rest in the sound discretion of the trial judge, who is in the best position in a particular case to gauge the need for the instruction and to determine its possible effects.

4. There Were No Special Circumstances In This Case Requiring An Instruction On The Consequences Of An NGI Verdict

In this case, the district court did not err in declining to give an instruction as to the consequences of a verdict of not guilty by reason of insanity. There was no suggestion during trial that the return of such a verdict would endanger the community, and the record contains no indication that the jury independently entertained such a notion.

At one point during deliberations, the jury sent a note to the court, stating: "We want you to explain the reason of

insanity." J.A. A9. That inquiry, however, cannot fairly be interpreted as expressing concern about the consequences of an NGI verdict, and petitioner does not argue otherwise. Rather, the jury's question appears merely to seek guidance as to the standard for finding a defendant legally insane. In response to the inquiry, the judge sent the jury a copy of the instructions on the legal definition of insanity and the burdens and standard of proof for the insanity defense. The jury appeared to be satisfied with the answer, as it did not make any further inquiries of the court.

Thus, nothing in this case rebuts the normal assumption that the jury, duly instructed not to consider the consequences of its verdict, followed its oath and returned a verdict based solely on the evidence presented at trial. Under those circumstances, it was not error for the district court to decline to give a further instruction regarding the consequences of an NGI verdict, a matter that was not a proper subject for the jury to consider in reaching its verdict.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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In The
Supreme Court of the United States
October Term, 1993

TERRY LEE SHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The Absence of Language in IDRA Specifically Authorizing the Use of the Requested Instruction Does Not Determine the Issue in this Case.

The Government points out that the IDRA made a number of changes in the federal insanity defense but emphasizes that Congress included no language in the text of the IDRA which would require the granting of the requested instruction. The absence of the language, the Government suggests, answers the question of whether Congress intended to adopt the practice of the D.C. Circuit – if Congress had intended by IDRA to change the practice which prevailed in all circuits but the District of Columbia, it would have said so explicitly.

The Court rejected a similar argument in *Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334 (1887). The Court considered whether an appeal from the special term of the Supreme Court of the District of Columbia would lie to the general term of the same court on the ground that the verdict was against the weight of the evidence, or whether the determination of that issue was lodged solely in the discretion of the trial judge, thereby foreclosing an appeal of the issue. The question turned on the interpretation of an act of March 3, 1863, which adopted a code of procedure modeled on the procedure of the State of New York. In holding that it had no jurisdiction to consider the appeal, the lower court had abided by a decision of the Supreme Court of the District of Columbia which had rejected the application of New York precedent and instead had interpreted the statutory procedure in light of existing precedent in the District of

Columbia and the State of Maryland, to which the courts of the District traditionally looked for authority:

"This well settled practice [holding that no appeal could lie in such a case], existing here when the act of March 3, 1863, was passed, should only be considered as changed by that act to the extent clearly indicated by its terms . . . '[I]t is a safe rule to apply the former practice and interpret the obscurities and deficiencies of the code by the light of that practice.' "

121 U.S. at 571.

In rejecting the position just quoted, the Court held that the enactment of a new scheme of procedure substantially adopted from a New York statute required that the issue be determined in light of the decisions of New York as they existed at the time of the adoption of the Act of March 3, 1863, rather than the precedents of Maryland and the Supreme Court of the United States interpreting the former procedure in the District.

The Legislative History is Important in Determining Congressional Intent in this Case and Confirms Congress Used §24-310 as its Model for IDRA.

The Government attacks Petitioner's reliance on the legislative history, contending that it is useless in answering the question posed in this case. While Petitioner agrees that the legislative history "cannot serve as an independent source having the force of law," (Government's Brief, p. 10), it is nevertheless an important and appropriate resource to determine if, and to what extent,

Congress intended to adopt the practice of the D.C. Circuit in regard to the instruction at issue. *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958).

The Government also contends IDRA resembles certain unspecified state statutes whose highest courts do not require such an instruction as much as it resembles D.C. Code §24-310; hence, "it is no less plausible to conclude that Congress intended to incorporate those courts' construction of their statutes, rather than the D.C. Circuit's gloss on the D.C. Code provision in *Lyles*." (footnote omitted). (Government's Brief, p. 13).

The problem with the Government's argument is that the only statute referred to in the legislative history is the D.C. Code. There are no references to any similar state statutes and no suggestion that any such statutes were studied or considered in drafting the legislation.

The legislative history repeatedly refers to D.C. Code §24-310. Referring to a part of the IDRA (18 U.S.C. §4243), the Senate Report states, "The requirements of subsections (a) through (c) are similar to the most recent pronouncement of Congress in this area, the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970." (The D.C. Act referred to is found at 84 Stat. 590 and in part amended D.C. Code §24-310.) Senate Report No. 98-225, 98th Cong., 1st Session 240, 241, reprinted 1984 U.S. Code Cong. & Adm. News 3182. In addition to the references to the D.C. Code cited in Petitioner's initial brief and at page 12 of the Government's brief, the Senate Report also refers to the D.C. statute on the insanity defense in text at pages 222, 238, 242, and 243, and in a footnote on page 243 (n. 63). All of these references support the inference that the D.C. Code was the model for IDRA.

The Government relies heavily on the differences between D.C. Code §24-310 and IDRA in arguing that even if §24-310 was the model, the changes are so substantial that the rule requiring adoption of the settled judicial construction placed on the model statute is not applicable. While there are differences, nothing in the statutory language suggests that Congress was disavowing the practice in the D.C. Circuit of granting the instruction at issue, and nothing in the statute is inconsistent with the employment of such a practice. The mere fact that there are differences does not alter the adoption of the settled judicial construction of the District of Columbia where it is evident that the D.C. Act was the model. *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 42 L.Ed. 752, 18 S.Ct. 347 (1898).

Empirical Studies of Juror Conduct in Insanity Cases Support the View that Juries are Concerned About the Disposition of the Defendant in the Event of an NGI Verdict, but Such Studies are Few and Imprecise.

The Government cites a number of studies to the effect that the instruction is not needed because most jurors already know that the defendant will be committed in the event an NGI verdict is rendered. (Government's Brief, pp. 14-15). The results of empirical studies are not as evident and uncomplicated as the Government suggests. ABA Standards for Criminal Justice 7-6.8 (2d ed. 1986 Supp.) (The commentary following Standard 7-6.8 notes that studies on the issue are contradictory and endorses the granting of the instruction).

One of the studies cited by the Government involved a survey mailed to the members of 10 actual juries which

had sat on trials involving an insanity defense.¹ Some of the trials had taken place as much as 4 years earlier. Responses were received from slightly less than 50% of the jury members. Different members of the same jury frequently gave contradictory answers as to what had taken place in their deliberations. The authors expressed reservations about how accurate their respondents' memories were. However, at least one juror on 8 of the 10 panels recalled that the jury had discussed what would happen to the defendant in the event of an NGI verdict. The article concluded that the jury ought to be instructed on the disposition to be made of the defendant in the event of an NGI verdict if the defendant requested the instruction, or if the defendant did not object. The article advocates substantially the same result as requested by Petitioner in this case.

Another of the studies cited by the Government involved experimental juries impanelled for the purpose of the survey.² No real consequences hung on their decisions, and this alone casts grave doubt on the reliability and applicability of the data to actual jury deliberations. Despite Dr. Simon's opinion that most jurors know that the defendant will be committed in the event of an NGI verdict, she concludes:

"It would be a useful precaution to include such an instruction under all circumstances and not leave it to the common sense of

¹ G.H. Morris, et al., *Whither Thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 San Diego L. Rev. 1058 (1977).

² R. Simon, *The Jury and the Defense of Insanity* (1967).

the jury. On occasion it can do some good and it can never do any harm." R. Simon at p. 96.

Another of the Government's authorities notes that even if most jurors correctly assume that a defendant found NGI will be committed, some jurors may still wrongly assume that the defendant will be released.³ It points out that even those who assume that commitment will result may nevertheless harbor uncertainty. In either of these eventualities, the jury deliberation may be tainted. The article concludes that an instruction similar to that advocated by Petitioner ought to be granted.⁴

In H. Weihofen, *The Urge to Punish: New Approaches to the Problem of Mental Irresponsibility* (1956, reprinted 1979), at page 120-21, the author comments on the preliminary statistics compiled by the University of Chicago Jury Project regarding deliberations in insanity cases by experimental juries. He states that not a single jury failed to discuss what would happen to the defendant if he were

³ Note, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 Colum. L. Rev. 1223, 1241 n. 91.

⁴ The article advocates that the following instruction be granted:

"If you find [the defendant] not guilty by reason of insanity, the law requires that [he/she] be committed to a suitable facility until such time, if ever, that the Court finds [he/she] may safely be released back into the community.

This information is given to you so that you will not speculate about what will happen to [the defendant] if found not guilty by reason of insanity. You are not to consider it in determining whether or not [the defendant] is guilty, not guilty, or not guilty by reason of insanity." 93 Colum. L. Rev. at p. 1246.

acquitted on the ground of insanity. He observes that, "many jurors who were somewhat disposed to a verdict of insanity were brought over to a guilty verdict by the argument that if declared insane the defendant would go 'scot free'".

More persuasive than academic investigations are actual cases where defendants requested and were refused the instruction, and juries convicted, apparently at least in part out of fear that the defendant might be released if found not guilty by reason of insanity. See, *United States v. Frank*, 956 F.2d 872, 882 (9th Cir. 1992), (Hug, C.J. concurring in part and dissenting in part), cert. den., 113 S.Ct. 363 (1992); *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976); *Commonwealth v. Mutina*, 366 Mass. 810, 323 N.E.2d 294 (1975).

CONCLUSION

Petitioner renews its request that the judgment be reversed and the matter remanded for a new trial.

Respectfully submitted,

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8
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IN THE

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OCTOBER TERM, 1993

TERRY LEE SHANNON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

**MOTION FOR LEAVE TO FILE AND BRIEF AMICUS
CURIAE OF THE COALITION FOR THE FUNDAMENTAL
RIGHTS OF EX-PATIENTS IN SUPPORT OF PETITIONER
AND FOR REVERSAL OF JUDGMENT BELOW**

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QUESTION PRESENTED

Does a proper interpretation of the Insanity Reform Act of 1984 require that the jury be instructed that a Not Guilty Only By Reason of Insanity verdict will not result in the release of a possibly dangerous defendant contrary to the public welfare?

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No. 92-8346

IN THE
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TERRY LEE SHANNON,
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UNITED STATES OF AMERICA,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE COALITION FOR
THE FUNDAMENTAL RIGHTS AND EQUALITY OF
EX-PATIENTS IN SUPPORT OF PETITIONER AND
FOR REVERSAL OF THE JUDGMENT BELOW

I.
STATEMENT OF INTEREST OF AMICUS CURIAE

This brief amicus curiae is being filed in support of the Petitioner and his arguments for an instruction to the jury regarding the disposition of the defendant after a successful plea of not guilty by reason of insanity ("NGRI") and for reversal of the judgment below. The counsel for the petitioner and respondent have both consented to the filing of this brief and their consents will be sent to the Court. This case is of paramount concern to all of the organizations participating in the advocacy of *amicus curiae*, the Coalition for the Fundamental

Rights and Equality of Ex-patients ("The Coalition for the Free").' The

' The participants in the Coalition for the Free are as follows:

NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC., has advocated for the rights of persons with psychiatric disabilities in New York State for over seventeen years. Since 1987, NYLPI has provided protection and advocacy services to New York City residents with psychiatric disabilities pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §10801, et seq. NYLPI has represented Amici before this Court in several cases including *Riggins v. Nevada*, ___ U.S. ___, 112 S.Ct. 1810 (1992).

PENNSYLVANIA PROTECTION AND ADVOCACY, INC. ("PP&A") is the federally mandated protection and advocacy agency in Pennsylvania for persons diagnosed as mentally ill pursuant to 42 U.S.C.A. § 10801 et seq. PP&A has represented persons who were raising the insanity defense. PP&A has been *amicus* in numerous cases, most recently, *Sullivan v. Zbley*, 493 U.S. 521 (1990) and *Riggins v. Nevada*, ___ U.S. ___, 112 S.Ct. 1810 (1992).

The MENTAL HEALTH CONSUMERS' NATIONAL LEGAL DEFENSE AND EDUCATION PROJECT was organized by consumers in Philadelphia, Pennsylvania in 1988 to provide technical assistance, research and training to

Coalition and many of its members have previously been involved as amici in

mental health consumers and their advocates on legal and policy issues involving mental illness and consumers' rights, and to assist consumers with access to the courts, legislatures and agencies on matters affecting their lives as consumers of mental health services.

The MENTAL HEALTH PATIENTS' ASSOCIATION OF NEW JERSEY, established in 1984, is a statewide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

The MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA was formed in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

The NATIONAL ALLIANCE for the MENTALLY ILL (NAMI) is a national, grass roots advocacy organization of families of persons with serious mental illness and persons with serious mental illness themselves. Composed of over one thousand local affiliates and 140,000 members, its goals are to advance treatment and services for persons with serious mental illness and to improve the quality of life for those who are

similar cases in federal and state courts across the country,² as well as in other cases involving forensic issues before this Court.³

Many of the members of the Coalition's constituent groups are themselves mental health consumers who have had their own experiences with the issues of the insanity defense and other mental conditions during trial proceedings. Many of the other Coalition members are family members of, and advocates for,

affected by these illnesses. An important aspect of NAMI's mission is to advocate for improvements in public systems of care and treatment for individuals with serious mental illness. NAMI is dedicated to the principle that persons with serious mental illness who become involved with criminal justice systems should receive appropriate treatment in appropriate treatment settings rather than jails and prisons.

² See, e.g., the briefs *amicus curiae* filed by the Coalition in *Riggins v. Nevada*, ____ U.S. ____, 112 S.Ct. 1810 (1992) and *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515 (1986).

³ See, e.g., the briefs *amicus curiae* of the Coalition in *Washington v. Harper*, 494 U.S. 210 (1990) and in *Perry v. Louisiana*, ____ U.S. ____, 111 S.Ct. 449 (1990).

persons involved in issues related to the insanity defense. Because of the Coalition's long-demonstrated concern about the issues related to the insanity defense, particularly where an individual who has been diagnosed with mental illness is raising the insanity defense in a capital case, the Coalition has a strong interest in participating as *amicus curiae* in this case.

II. SUMMARY OF ARGUMENT

A. The requested instruction on disposition of persons found NGRI is necessary in order to assure that persons with legitimate basis for NGRI pleas have an opportunity to receive an appropriate verdict and whatever necessary treatment in non-prison settings before they are released into the community.

B. The "rule" in *United States v Rogers*, separating the function of jury and judge with regard to the guilt and sentencing phases of trial is neither uniform nor general. The rule is subject to limitations which support the argument for an exception for instructions regarding disposition of persons found NGRI.

C. Defendants seeking to be found NGRI are entitled to jury instructions on the disposition of NGRI's based on juror misunderstanding of NGRI dispositions, just as such defendants subject to prosecutor mistatements on disposition are now entitled to such instructions.

III. ARGUMENT

A. Without Disposition Instructions, Persons Who Would Otherwise Legitimately Be Found NGRI May Be Inappropriately Sentenced.

Two values should underlie the law on jury instructions regarding the disposition of defendants found NGRI and, in particular, the decision in this case and the other similar cases currently before this Court.⁴ First, accused persons with legitimate bases for their NGRI pleas should receive fair

⁴ *Shannon v. United States*, 981 F.2d 759 (5th Cir. 1993), cert. granted, 62 U.S.L.W. 3342 (U.S. Nov. 1, 1993) (No. 92-8346); *Thigpen v. United States*, F.3d __, Nos. 91-3236 and 91-8082, Slip Opinion, (11th Cir., Oct. 22, 1993), (en banc) petition for cert. filed, Nov. 15, 1993 (No. 93-6747) (consolidated with *Barnett v. United States*); *Barnett v. United States*, 989 F.2d 1116 (11th Cir. 1993), Nos. 91-3236 and 91-8082, Slip Opinion (11th Cir., Oct. 22, 1993) (en banc), petition for cert. filed Nov. 15, 1993 (No. 93-6747) (consolidated with *Thigpen v. United States*); *United States v. Bogdanoff*, 993 F.2d 884 (9th Cir. 1993), No. 91-50492, Memorandum Opinion (9th Cir. May 24, 1993), petition for cert. filed Aug. 23, 1993 (No. 93-5743); and *Fisher v. United States*, No. 93-7002, Slip Opinion (3rd Cir. Nov. 10, 1993), petition for cert. filed Dec 8, 1993 (No. 93-7000).

consideration of their plea, with reasonable court guidance to minimize the risk that juries will erroneously find them guilty merely to remove them from society. Second, persons with legitimate bases for their insanity pleas should receive appropriate care and treatment in therapeutic facilities, not unwarranted confinement in prisons or jails.

The outlook for the first value -- accurate insanity verdicts unclouded by erroneous assumptions -- is bleak, absent guidance from the Court. Empirical research suggests that the public suffers from glaring misconceptions about the insanity plea. Members of the public believe that insanity acquittees go free; that they "beat the rap."⁵ Indeed, this belief accords with common sense, which quality we wish jurors to bring to their deliberations.

Civics courses teach us from a very early age that a finding of guilt carries with it the prospect of punishment,

⁵ See Pogrebin, Regoli and Perry, "Not Guilty by Reason of Insanity: A Research Note," 8 *Int'l J.L. & Psychiatry* 237 (1986). Cf. Rodriguez, Lewinn and Perlin, "The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders," 14 *Rutgers L.J.* 397 (1983) (discussing misconceptions about the insanity defense). Contrary to these misconceptions, the facts suggest that insanity acquittees spend as much time in confinement as persons convicted of equivalent offenses. See Pogrebin, Regoli and Perry, *supra*, at 240.

including imprisonment, and that acquittal means freedom. Countless news reports and docudramas depict the just-acquitted defendant embracing her lawyer and walking out of the courtroom to freedom. The notion that an acquitted defendant would remain in state custody, as the Insanity Defense Reform Act mandates, seems radically counterintuitive. Yet, the respondent would have this Court believe that jurors can slay that intuition with absolutely no guidance from the court.

Case law suggests otherwise with a real risk of "compromise" guilty verdicts as a result.⁶

⁶ See, e.g., *Evalt v. United States*, 359 F.2d 534, 546 (9th Cir. 1966) ("And affidavits by two jurors state that each of them, and "a few jurors" had and expressed doubt as to Evalt's sanity at the time of the robbery but felt, because of the prosecutor's closing statement, that they had no choice but to convict. They further state that, if they had known that Evalt would receive treatment, they would have voted to acquit."); *Government of V.I. v. Fredericks*, 578 F.2d 927, 935 (1978) ("A juror who feels that a verdict importing freedom for [sic] defendant will endanger the community might, out of his sense of social responsibility, be swayed from rational deliberation and be unwilling to weigh properly the evidence of defendant's mental condition.") and, at 936, ("A juror who is convinced that a defendant is dangerous, but who believes that he did not commit the acts charged, might be willing to compromise on a verdict of not guilty by reason of insanity rather than insist on an acquittal.") See also, Schwartz, "Should Juries Be Informed of the Consequences of the Insanity Verdict?", *J.L. & Psychiatry* 167, 174 (1980) ("Jurors may reason, 'Under the n.g.i. verdict, the defendant will not go to prison, and yet he will not be set free either. Committing a possibly innocent person is at least not as harsh as imprisoning him; nor is

The persistence of these misconceptions imperils the second value -- appropriate care and treatment for defendants with legitimate bases for their NGRI pleas.

Whatever the real cause or causes - deinstitutionalization, criminalization of mental illness, better diagnostics, societal and legal attitudinal shifts - there can now be little doubt that persons with mental illness are

committing a possibly guilty person as dangerous as freeing him'') Finally, the Michigan Supreme Court succinctly described the two possible "compromise" uses of an NGRI verdict after instructions on disposition as follows:

"(1) the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and
(2) the possible "invitation to the jury" to forget their oath to render a true verdict according to the evidence by advising them of the consequence of a verdict of not guilty by reason of insanity.

We conclude that the reasons given in support of the first proposition far outweigh the fear of jury integrity expressed in the second proposition." *People v. Cole*, 172 N.W.2d 354, 366 (Mich. 1969). See also, Comment, "The Not Guilty By Reason of Insanity Verdict: Should Juries Be Informed of its Consequences?", 72 Ky. L. J. 207, 217 (1983-4).

increasingly part of the population in our nation's correctional system.⁷

⁷ See also, National Institute of Mental Health, *The Mentally Disordered Offender*, U.S. Dept of HHS, Rockville, MD (1986). See, e.g., Isaac and Armat, *Madness in the Streets*, Free Press, N.Y. (1990) at 7 ("There are as many individuals suffering from serious mental disorder in our jails and prisons as there are in our public mental hospitals."), at 156 ("Not surprisingly, jail and prison officials complain of experiencing a sharp increase in seriously mentally ill inmates.") See, National Alliance for the Mentally Ill and Public Citizen's Health Research Group, *Criminalizing the Seriously Mentally Ill*, (1992) ("A nationwide survey of 1391 local jails, which together hold 62 percent of our nation's jail inmates, has revealed the unimaginable: 7.2 percent of jail inmates - more than one of every 14 inmates - suffer from serious mental illness. . . . [E]ach day over 30,700 seriously mentally ill individuals serve time in our nation's jails; each year, over 11 million days are spent by seriously mentally ill individuals in jail.") See also, Gladwell, "Jails Used as Holding Wards for Mentally Ill, Study Finds" The Wash. Post, Sept 10, 1992 p.A.2. But see Johnson, *Out of Bedlam*, Basic Books, U.S. (1990), 159, ("Although it is true that there are mentally ill in jail, just as there are some violent criminals who are out of their minds, this fact has very

Again, whatever the real cause or causes, there are a wide range of proffered solutions to this problem, including *inter alia* better screening programs, diversion programs and increased reliance on improving the quality of correctional institutional programs for treating mental illness.⁸

For the purposes of this case and the others currently before this Court,⁹ however, the narrow issue is the potential for serious harm to defendants with mental illness who do not receive otherwise valid NGRI verdicts as a result of jury misunderstandings about their post-trial disposition.

Given Congress' decision not to abolish

little to do with deinstitutionalization.")

⁸ See, e.g., Steadman, McCarty and Morrissey, *The Mentally Ill in Jail: Planning for Essential Services*. Guilford Press, N.Y. (1989); see also National Institute of Mental Health, *Developing Jail Mental Health Services: Practice and Principles*, U.S. Dept of HHS, Rockville, MD (1986); National Institute of Mental Health, *Survey of Facilities and Programs for Mentally Disordered Offenders*, U.S. Dept of HHS, Rockville, MD (1987); and The National Institute of Justice, *The Special Management Inmate*, Am. Justice Institute, (1985)

⁹ See footnote 4 above.

but merely to alter the insanity defense through the Insanity Defense Reform Act,¹⁰ ("IDRA") there can be little debate about the long-standing historic general principle in our law for excusing certain otherwise criminal behavior and addressing the illness that is the basis for that legal excuse.¹¹ Moreover, even

¹⁰ Insanity Defense Reform Act of 1984, 18 U.S.C. 4241-4247. See also Miller, "Recent Changes in Criminal Law: The Federal Insanity Defense," 46 La. L.R. 336, 347 (1985) ("Three state laws have abolished insanity as a defense."); at 347 n.64 ("Legislation introduced into the United States Senate by Senator Strom Thurmond would have abolished the defense of insanity in federal courts. S. 2390, 97th Cong. 2nd Sess. (1982) This bill was reintroduced as S.105, 98th Cong. 1st Sess. (1983) and reported out on August 5, 1983 as part of Title IV of S. 1762, 98th Cong. 1st Sess. (1983).); and at 348, n. 73, regarding states' adoptions of "guilty but mentally ill" ("GBMI") verdicts.

¹¹ *Hadfield's Case*, 27 How. St. Tr. 1281 (1800), is traditionally cited for its language on informing the jury of the disposition of NGRI acquittal (see e.g., Liu, "Federal Jury Instructions and the Consequence of a Successful Insanity Defense," 93 Colum. L. Rev. 1223, 1230, n.31 (1993)). However, the Crown counsel's speech in that case is a model summary of the insanity defense at common law: (". . . {I}f a man is completely

in the context of convicted persons, this Court and others have long held that the provision of appropriate health services, including treatment of mental illness, is guaranteed under the 8th Amendment.¹² Notwithstanding these decisions, however, disputes over the existence and quality of prison mental health services abound in federal court cases over prison conditions.¹³ In addition, a prison sentence carries its own form of stigma with resulting discrimination in housing and social services after release into the community.

Finally, it must also be noted that having once been inappropriately

deranged, so that he know not what he does, if a man is so lost to all sense in consequence of the infirmity of disease, that he is incapable of distinguishing between good and evil - that he is incapable of forming a judgment upon the consequences of the act which he is about to do, that then the mercy of our law says, he cannot be guilty of a crime. ." *Hadfield's Case*, 27 How. St. Tr., above, at 1286. (emphasis original) See also Rodriguez, Le Winn and Perlin, above, for a short history of the insanity defense.

¹² *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392 (1981) and *Inmates of Allegheny Co. Jail v. Pierce*, 617 F.2d 754 (3rd Cir. 1979).

¹³ *Austin v. Lehman*, No. 90-7497 (E.D. Pa. filed Nov. 20, 1990).

sentenced to prison, transfers to mental health treatment facilities outside of prison are fraught with issues regarding stigmatization, due process protection and "right to refuse" treatment questions unique to the context of prisoners and forensic patients.¹⁴

Clearly, then, given the continued questions about the bare availability and adequacy of prison-based mental health treatments, the best guarantee of appropriate treatment for defendants in these cases is the initial appropriate disposition to treatment pursuant to an NGRI verdict under IDRA. Once the first error occurs in that disposition - arguably by failing to address properly the jury's misunderstanding of NGRI dispositions - that error is further compounded by the lack of appropriate treatment for mental illness in prison or through alternative means. In summary, an unsuccessful -though otherwise valid - NGRI plea typically increases the likelihood that the defendant will not receive appropriate care and treatment for his/her mental illness in accordance with their constitutional rights.¹⁵ Amici respectfully submit that this

¹⁴ See, e.g., *Washington v Harper*, 494 U.S. 210 (1980), *Perry v. Louisiana*, U.S. ___, 111 S.Ct. 449 (1990) and *Vitek v Jones*, 445 U.S. 480 (1980).

¹⁵ See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *DeShaney v. Winnebago Co. Dept. Soc. Service*, 489 U.S. 189 (1989).

"tragedy" of errors can only be corrected by proper jury instructions regarding NGRI dispositions in the first instance.

B. Notwithstanding United States v. Rogers, Juries Should Be Instructed Regarding the Disposition of Persons Found N.G.R.I.

1. United States v. Rogers and its Limitations

In cases and commentaries involving the issue of instructions to juries on the disposition of persons found NGRI, it has become *de rigueur* to cite *United States v. Rogers* 422 U.S. 35 (1975) for the proposition that juries and judges each have separate roles in deciding guilt and punishment, respectively.¹⁶ Again and again, the *Rogers* holding is cited as the leading authority for that rule of law in the NGRI jury instruction cases preceding this case,¹⁷ in this case¹⁸ and in the

¹⁶ See, e.g., *U.S. v. Frank*, 956 F.2d 872, 879 (9th Cir. 1991) (en banc); and *U.S. v. Blume*, 967 F.2d 45 (2nd Cir. 1992); see also Liu, "Federal Jury Instructions and the Consequences of a Successful Insanity Defense", 93 Colum. L. Rev. 1223, 1227 n.20 (1993).

¹⁷ Ibid.

¹⁸ *Shannon v. U.S.A.*, 981 F.2d 759, 761 (5th Cir. 1993), cert. granted 62 U.S.L.W. 3342 (U.S. Nov 1, 1993) (No. 92-

other cases on this issue currently pending before this Court.¹⁹ The implication is that the *Rogers* "rule" is absolutely settled, uniform and unassailable, and that an instruction on NGRI disposition would be a sole and heretical exception to that rule.

As with many similarly stated rules of law, however, even this *Rogers* rule is subject to some limitations and exceptions. Initially, of course, as many courts have noted specifically, the *Rogers* rule is limited where, by statute, the jury is actually given a role in sentencing itself.²⁰ Clearly, then, the *Rogers* rule is not applied in the typical capital sentencing scheme where the jury has such a sentencing role.²¹ Under this Court's own "death qualification" opinions, jurors are now routinely exposed to *voir dire* as well as court

8346).

¹⁹ See footnote 4 above.

²⁰ See, e.g., *U.S. v. Frank*, 933 F.2d 1491, 1498 (9th Cir. 1991) ("It is the practice in the federal courts to instruct juries that they are not to be concerned with the consequences to the defendant of the verdict, except where required by statute." (citing *Rogers*) But see *U.S. v. Blume*, 967 F.2d 45,49 (2nd Cir. 1992).

²¹ See, e.g., 42 Pa. C.S.A. §9711(1) (1988)

instructions regarding their role in assessing the death penalty *vel non*. Thus, routinely judges in capital cases prepare jurors for the possible sentencing results of their findings in the guilt phase of those cases.²²

On reflection, there are some other obvious situations where jurors clearly know or have reason to know what is likely to happen to the defendant after their verdict.²³ No doubt, with

²² See, e.g., *Wainwright v. Witt*, 469 U.S. 412 (1985); *Lockhart v. McCree*, 476 U.S. 162, (1986); and *Ross v. Oklahoma*, U.S. 487 U.S. 81 (1988). See also *Deutsch*, "Menendez Trial Draws to Close," *Phila. Inq.*, Dec. 9, 1993 p.A7 ("The answer to that question may be a life-or-death one for Lyle Menendez" said [defense attorney] Burt, reminding jurors several times that the death penalty was a possibility in the case"). See also, for a discussion of the death penalty case variant of a "compromise" verdict, *McCall*, Comment, "Sentencing by Death Qualified Juries and the Right to Jury Nullification," 22 *Harv J. on Legis.* 289 (1985).

²³ Another arguable line of caselaw exceptions to the *Rogers* rule may be cases involving juveniles being tried as adults since juries may know that a juvenile appearing and convicted before them is going to receive an adult sentence. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361 (1989). Yet another "exception" to *Rogers* in practice

additional research beyond the scope of this case and brief, additional, perhaps less obvious examples of juror knowledge of the likely dispositions would emerge as "exceptions" to *Rogers*.²⁴ The point is that arguing over instructions regarding NGRI dispositions as though they would be the only exception to the general rule stated in *Rogers*, is misleading and may result in particularly unfair, "compromise" guilty verdicts in these cases.²⁵

2. The Jury Should Be Instructed Regarding Disposition of NGRI's.

There is a relative dearth of jury studies about what jurors know, or think

may occur where evidence of co-defendants' crimes, sentences and plea agreements come before juries as part of direct and/or cross-examination during trials of their accomplices. See e.g., *U.S. v. Leslie*, 542 F.2d 285 (5th Cir. 1976) and *U.S. v. Chilcote*, 724 F.2d 1498, 1504 n.6 (11th Cir., 1984); See generally, Note, "Impeaching the Underworld Informant", 63 So. Cal. L Rev. 1405, (1990).

²⁴ See, e.g., Heumann and Cassada, "Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases," 20 Am. Crim. L. Rev. 343 (1983).

²⁵ See footnote 6 above.

that they know, about the disposition of NGRI acquittals.²⁶ Suffice it to say,

²⁶ But see, e.g., Simon, *The Jury and the Defense of Insanity*, Little Brown, Boston (1967); Morris, Bozetti, Rush and Read, "Whither Thou Goest? An Inquiry Into Jurors' Perception of the Consequences of a Successful Insanity Defense", 14 *San Diego L. Rev.* 1060 (1977). See also *U.S. v. Frank*, 956 F.2d 872, at 839, ("One empirical study of juries conducted by the University of Chicago Law School showed that juror's concern with what will be done with defendant if he is acquitted by reason of insanity is one of the most important factors in jury deliberations.") (Hug, J. concurring in part and dissenting in part) citing Weihofen, "Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code," 29 *Temp. L.Q.* 235, 247 (1956). In general, studies have shown that the public believes in the following "myth" regarding disposition of NGRI acquittals:

"#8 MYTH: Most insanity acquitees go free immediately or within a short period of time following their trial.

REALITY: The majority of acquitees are confined for significant periods of time."

National Commission on the Insanity Defense, *Myths and Realities*, National Mental Health Assoc., Arlington, Va. (1983) p.24. See also, footnote 5 above.

the "jury is still out" on any definitive answer to that question, as perhaps it always will be. However, given the existing evidence and the high cost of error in assuming that jurors are not being influenced by misinformation, amici respectfully urge this Court to adopt a rule providing for juror instructions, subject to defendant objection, regarding disposition of NGRI in all such cases, just as jurors are now instructed in cases where there has been a misleading remark by the prosecutor regarding such disposition.²⁷

Amici urge adoption of such a rule because as long as there continues to be credible evidence from research that some - perhaps most - jurors do not understand the results of an NGRI holding, then the result of that misunderstanding is identical to the perceived result in cases of misleading prosecutorial comments. To the defendant, it really does not matter how the jurors come to be misled about the disposition of NGRIs: in the interest of fairness, the jurors require a curative instruction to correct their apparent misunderstanding regardless of its cause or source. As many courts and commentators have already noted, jurors already have common knowledge of the disposition of "guilty" and "not guilty" defendants; in this matrix, it is only the NGRI verdict that

²⁷ *U.S. v. Birrell*, 421 F.2d 665 (9th Cir. 1970) (prosecutor's comments), *U.S. v. McCracken*, 488 F.2d 406 (5th Cir. 1974) (court instruction).

they may not fully understand, particularly because of the changes in federal law regarding the insanity defense after the *Hinckley* case.²⁸

²⁸ See e.g., *Lyles v. U.S.*, 254 F.2d 725, 728 (D.C. Cir. 1957) ("It is common knowledge that a verdict of not guilty means a prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of insanity has no such common understood meaning. As a matter of fact, its meaning was not made clear in this jurisdiction until Congress enacted the statute of August 9, 1955.") The same might be said of the lack of any "common understood meaning" now of the effects of IDRA, passed by Congress only in 1984, notwithstanding Judge Winters' remarks about the *Hinckley* case in *U.S. v. Blume*, 967 F.2d 45, 54 (2nd Cir. 1992) (Winter J. concurring in result) ("After all, the nation's most celebrated insanity acquittee, John Hinckley, has been confined for over 10 years.") But see *U.S. v. Blume*, 967 F.2d above at 52 (Newman, J. concurring) ("It [not giving an NGRI disposition instruction] may well have made sense before 1984 to protect the defendant from the risk of an undeserved guilty verdict by keeping jurors ignorant of the fact that a successful insanity defense would result in the defendant's release from federal custody.") (emphasis original) Finally, as to the much travelled language regarding jury instructions on NGRI

The bare minority of federal cases that have required such instructions regarding NGRI disposition include cases involving both "active" misleading remarks and "passive" juror misunderstanding. However, there is a striking similarity between the typical prosecutorial misleading comment and the usual expression of juror misunderstanding.²⁹ Given that

disposition from Senate Report, No. 98-225, 98th Cong., 1st Sess. 240 (1983), Judge Neuman's concurrence in *U.S. v. Blume*, 967 F.2d 48, 53 n.5 (2nd Cir. 1992) (Newman, concurring) provides the best insight on the comment's intended effect in requiring an instruction on NGRI disposition subject only to a defense objection: "Because of the Committee's explicit endorsement of the D.C. Circuit's mandatory instructional rule, I agree with Judge Arnold that the use of the word "may" in the passage quoted from the Committee's report must be understood to contemplate the exercise of discretion only when the defendant objects to an instruction, as the report's very next sentence makes clear."

²⁹ Compare *Evalt v. United States*, 359 F.2d 534, 545 ("The final sentence of the closing argument for the government is as follows: 'If you find him not guilty, he walks out of this courtroom a free man, and I know ladies and gentlemen, that you are not going to turn this man loose again on society.'")

similarity, the analogy between these two types of cases seems more than apt.

Finally, we must address the issue of the threat that NGRI disposition instructions may result in NGRI as a "compromise" verdict where a jury might otherwise acquit, but remains concerned about public safety. The answer to that perceived dilemma is clear, however, once the instruction becomes a defense choice, as it would have been here in *Shannon*. This Court has already noted that even within the correction system, mental illness carries a substantial stigma.³⁰ Given that stigma and the low success

(emphasis added); *U.S. v. Birrell*, 421 F.2d 665, 666 (9th Cir. 1970) ("turn him loose on society") with Government of *V.I. v. Fredericks*, 578 F.2d 927, 933 (1975) ("walk out") (defense counsel's characterization of jury response); *U.S. v. Blume*, 967 F.2d above at 54 (Winter, J., concurring in result) ("For example, if a witness or a prosecutor made a statement implying that a particular would go free if acquitted by reason of insanity. . . .") (emphasis added) and (". . . [A] particular jury may think that insanity acquitees usually go free. . . .") (emphasis added) Liu, "Federal Jury Instruction and the Consequence of a Successful Insanity Defense" 93 *Col. L.R.* 1223 (1993) ("'I did not want a mad dog released' - Anonymous Juror").

³⁰ *Vitek v. Jones*, 445 U.S. 480 (1980).

rate of NGRI pleas,³¹ limiting the jury instruction on NGRI disposition to cases where the defendant exercises that choice, or at least does not object, would balance any fears of a compromise NGRI verdict arising from what otherwise might have been an acquittal.

IV. Conclusion

For the foregoing reasons, amicus curiae, the Coalition for the Free, respectfully urges this Court to reverse the judgment below.

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³¹ See, e.g., Puente, "6th N.Y. rampage victim dies, 'Defense of last resort': insanity," U.S.A. Today, Dec. 13, 1993, p.3A ("The man accused of the shooting rampage that killed six Long Island commuters may use what lawyers call 'the defense of last resort': insanity.")